81-48

No. ____

Office-Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JACK KEELER and GRACE KEELER, et al.,
Petitioners,

—against—

DANIEL W. JOY, individually and as Commissioner of the office of Rent and Housing Maintenance of the City of New York Department of Housing, Preservation and Development,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

In a tenants' action under 42 U.S.C. §1983 challenging, on federal due process grounds, the New York City Rent Control agency's procedures for the issuance of Certificates of Eviction (permitting eviction of tenants from rent-controlled apartments which they are otherwise statutorily entitled to retain) the District Court sua sponte ordered summary judgment for the defendant Commissioner. The Court of Appeals (Circuit Judge Kearse dissenting) affirmed. The questions are:

(1) Are the tenant petitioners constitutionally entitled to (a) notice adequate to inform them of the nature of, and issues in, the proceeding; (b) confrontation and cross-examination of adverse witnesses; (c) opportunity to rebut evidence submitted on behalf of

the landlord, and to comment on the hearing examiner's report to the decision-making official; and (d) a decision based on a record of the proceedings?

(2) Was it error to grant summary judgment sustaining as constitutional the Rent Control Agency's procedures, despite disputed issues of fact relevant to the constitutional issues?*

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* The parties to this proceeding are the petitioners Jack and Grace Keeler, Emily Ramos, Rose Mann, John Nichols, Ethel McGinnity, Wilma and John Hilber, Fay Genuard, Margaret J. Lennon, Patricia Bukawyn, Ralph Gulvino, Elizabeth Kravitz, Lee Fagin, Caterina Stolfi and Angelo Criscio, ("Tenants") and the respondent Daniel W. Joy, the Commissioner of the Office of Rent and Housing Maintenance of the City of New York Department of Housing Preservation and Development., ("Commissioner").

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, Jack and Grace Keeler and others pray that a writ of certiorari issue to review the decision and order of the United States Court of Appeals for the Second Circuit dated March 9, 1981.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 641 F.2d 1044 and is set forth at Appendix A herein. The opinion of the District Court dated is reported at 489 F.Supp. 568 and is set forth as Appendix B herein.

JURISDICTION

The order of the Court of Appeals for the Second Circuit was dated and

entered February 9, 1981. Petitioners filed a timely motion for rehearing in banc which was denied on April 9, 1981 in an order set forth at Appendix C herein. This petition for a writ of certiorari is filed within ninety days of the denial of the motion for rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Constitutional provision involved is the Fourteenth Amendment to the United States Constitution. The state statutory provisions involved are sections Y51-6.0 (b) and Y51-8.0(c) of the New York City Administrative Code and sections 81, 83, 85, 94, and 97 of the New York City Rent and Eviction Regulations. The text of these provisions is set forth as Appendix D herein.

STATEMENT OF THE CASE

Petitioners Jack and Grace Keeler and other tenants in rent-controlled apartments in New York City brought this proceeding under 42 U.S.C. § 1983 to challenge the administrative procedures followed by the New York City Rent Control agency in issuing Certificates of Eviction which permit landlords to evict tenants from their apartments. Rent-controlled tenants (also called "statutory tenants") are generally entitled by statute to continue in possession of their apartments as long as they pay their rent and do not commit or permit a nuisance, interfere with other tenants, or damage the property.* At issue in this case is the

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* In such cases, the tenant may be evicted without prior administrative action in a judicial proceeding in the New York City Housing Court. N.Y.C.
(Footnote continued on next page)

section of the New York City Rent Control law which permits landlords in very narrow circumstances to evict otherwise blameless and rent-paying statutory tenants from their apartments. The portion of the statute in question allows an eviction only when the landlord "in good faith" seeks to recover the apartment for his own personal use and occupancy or for the use and occupancy of his immediate family; in most cases the landlord must also establish that he or the family member for whom the apartment is sought has "an immediate and compelling necessity" for the apartment (A-77).

(Footnote continued from preceeding page)

Administrative Code § Y51-6.0(a); See N.Y. Real Prop. Acts. § 701 et seq. The procedures involved in such proceedings include the right to judicial trial and are not at issue here.

The tenants claim that the administrative procedures for determining whether the landlord is entitled to a Certificate of Eviction deny them federal due process. Specifically they claim: (1) that the notices they receive are misleading and fail to advise them of the issues; (2) that they are not provided an opportunity to confront and cross-examine adverse witnesses or to rebut evidence submitted on behalf of the landlord; (3) that decisions are not based on a transcript of the record but on an examiner's report which the parties are not permitted to see or correct. The tenants claim that because the issues to be determined by the Commissioner include issues of fact and require an assessment of the landlord's credibility, the deficiencies in the procedures violate the Constitutional

requisites of due process.

There was no trial of the issues below. The tenants moved for summary judgment, based on depositions and affidavits which the tenants believed supported their contentions with respect to the nature of the procedures before the Commissioner, in contradistinction to the procedures the Commissioner claimed were generally operative. The District Court sua sponte granted summary judgment on behalf of the Commissioner, and also denied tenants' motion for class certification* (A-68).

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* Denial of class certification was apparently based on the District Court's denial of all relief to the tenants; the District Court mentions no respect in which the proposed class does not meet the requirements of Rule 23 of the Federal Rules of Civil Procedure, and the Commissioner did not oppose class certification.

The District Court treated the action as an attack on the facial invalidity of the New York City Rent Control Law rather than as an attack on the actual procedures followed by the Commissioner. The District Court found no constitutional infirmity in the law. The Court found that tenants do not have any interest in their apartments that is protected by due process (A-63-65) and, in any case, that the procedures set forth in the City rent law are not unconstitutional. Specifically, the Court found the notice provided tenants to be adequate since "[i]t is not the purpose of this or any other Notice of a pending proceeding to advise the parties of their rights, defenses, etc...." (A-50). Further, despite the usual rule that a court should resolve all ambiguities and draw all reasonable inferences in favor

of the party against whom summary judgment may be granted, the court, ignoring the tenants' evidence to the contrary, found that tenants could request subpoenas, inspect opposing papers, and see and comment on recommended decisions (A-54, 59).

The tenants then appealed to the United States Court of Appeals for the Second Circuit. With Judge Kearse dissenting, that Court affirmed the decision of the District Court. Judge Moore's majority opinion concludes that the rent-control procedures are adequate; the opinion does not address the tenants' claim that these procedures are not in fact followed. Concurring, Judge Tenney, agreeing with Judge Kearse, found that: "the record evidences disputed issues of fact and does not fully support the district court's statements. As noted

by the dissent, unanswered or disputed questions remain regarding the availability of a subpoena and a tenant's right to cross-examine witnesses, to inspect documents and to file rebuttal material." (A-14). However, Judge Tenney concurred in the opinion affirming the award of summary judgment to the Commissioner on the ground that none of these factual issues "rise[s] to Constitutional proportions." (A-25).

Judge Kearse dissented, stating "I find factual disputes as to virtually all stages of the procedures in question." (A-35). Quoting the notice sent to tenants, Judge Kearse found that "it is entirely possible" that such notice "may lull tenants into the false belief that the question of their eviction will be litigated in court, not in the adminis-

trative agency from which the notice was sent." (A-36).

With respect to the conduct of the administrative proceedings, Judge Kearse noted that the record does not support the District Court's description of the proceedings, and that there are many disputed issues of fact which could not properly be resolved by summary judgment. These disputed issues include whether hearing-type conferences are always held, whether tenants can subpoena witnesses, whether tenants are permitted to question opposing witnesses and inspect documentary submissions, whether tenants are permitted to file rebuttal material, whether there is any need for a recording or transcript of the conference, and whether the hearing examiner's report to the Commissioner is available to the

parties for review prior to the Commissioner's decision (A-37).

Accordingly, Judge Kearse concluded that a trial should have been held to assess whether the procedures at issue provide rent-control tenants with a meaningful opportunity to test the landlord's credibility and his good faith (A-40).

Petitioners timely requested rehearing in banc which was denied on April 9, 1981 with Judge Kearse again dissenting (A-74).

REASONS FOR GRANTING THE WRIT

The decision of the Court below not only misapplies well-established principles governing the appropriateness of summary judgment, but also reflects fundamental misunderstanding of the critical importance of the procedural safeguards the tenants seek. There are over 400,000 rent-controlled tenants in the City of New York, many of whom are indigent, elderly or both.* Each year there are hundreds of Certificate of Eviction applications, which result in large numbers of

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* Rental Housing In the City of New York, Supply and Condition 1975-1978 (January, 1979). A copy of this report is included in the record of the case. Petitioners have requested certification of the full record to this Court.

evictions.*

The decision below, denying statutory tenants an opportunity to prove at trial that the procedures they seek are necessary for the protection of their substantive rights and are in practice denied by the Commissioner, has devastating results for these tenants now facing eviction. Moreover, insofar as the court below held that notice need not advise tenants of their rights and that safeguards such as cross-examination are unnecessary, the

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* From 1962 to the end of 1978, 43,374 apartments in the City of New York were subjects of Certificate of Eviction proceedings, and Certificates were granted in 15,092 cases. (Affidavit of Harry Michelson dated February 13, 1980 in opposition to tenants' motion for summary judgment). While this lawsuit was filed by tenants, improvement in the fairness of the procedures here would also benefit landlords with meritorious claims.

majority decisions have significant implications for other administrative agencies and the public they serve.

Apart from the broad social impact of the decision below, as we shall show hereinafter, that decision is in conflict with applicable decisions of this Court such as Goldberg v. Kelly, 397 U.S. 254 (1970), Memphis Light, Gas and Water Division v. Craft, 436 U.S. 1 (1978) and Califano v. Yamasaki, 442 U.S. 682 (1979) and in reaching that decision the lower courts have so far departed from constitutional procedural standards that exercise of the corrective supervisory power of this Court is imperatively required.

1. Where there are factual issues and issues of credibility to be determined, due process requires an oral hearing with opportunity to cross-examine adverse witnesses and rebut adverse evidence.

Under the New York rent-control law, there are only a few specified grounds permitting eviction, and tenants have a right to continued occupancy until such grounds for eviction are established. N.Y.C.Administrative Code Y51-6.0(b). Since the tenant's interest may only be terminated for cause, federal due process safeguards apply. See Goldberg v. Kelly, 397 U.S. 254, 263-264 (1970) and Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1, 11-12 (1978).

This case presents important issues relating to the kind of hearing required where the landlord seeks to evict on the ground that he in "good faith" wants the

apartment for the use of himself or a relative, and meets the further requirement (applicable in most cases) that he has an "immediate and compelling necessity for the apartment."* More specifically, the case involves the constitutionality of procedures which, among other failings, permit ex parte submission of evidence and deny tenants the right to confront and cross-examine adverse witnesses.

The issues in Certificate of Eviction proceedings are predominantly issues of fact. The Office of Rent Control has no special knowledge of the facts and must rely on presentations by the parties.

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* N.Y.C. Admin. Code § Y51-6.0(b). An "immediate and compelling necessity" is not required when there are fewer than 12 apartments and the landlord seeks the apartment for himself (A-77).

The Commissioner has to determine issues such as whether the landlord is proceeding in good faith or with a retaliatory motive, whether he or she intends to use the apartment for the use specified in the Certificate, and whether or not the facts establish an "immediate and compelling necessity" for the apartment. Furthermore, since the landlord's "good faith" is a requirement for a Certificate, the cases present issues of credibility, the resolution of which requires an opportunity to see and cross-examine adverse witnesses.

In Califano v. Yamasaki, 442 U.S. 682 (1979) this Court, noting the constitutional issues that otherwise would be presented by the denial of an oral hearing to Social Security recipients seeking waiver of overpayment decisions, held that the Social Security

Act requires such a hearing before the decision maker:

> As the Secretary's regulations make clear, "fault" depends on an evaluation of "all pertinent circumstances" including the recipient's "intelligence...and physical and mental condition" as well as his good faith. We do not see how these can be evaluated absent personal contact between the recipient and the person who decides his case. Evaluating fault, like judging detrimental reliance, usually requires an assessment of the recipients' credibility, and written submissions are a particularly inappropriate way to distinguish a genuine hard luck story from a fabricated tall tale. 442 U.S. at 696-7.

The fundamental error in Judge Tenney's concurring opinion is his stated assumption that the issues involved in Certificate of Eviction cases are not usually susceptible to factual challenge by the tenants. Judge Tenney sought to distinguish Califano v. Yamaski, supra, saying that "the rent examiner is not really attempting to distinguish between a 'hard luck story' and a 'fabricated tall tale.'" (A-22).

On the contrary, the record in these cases clearly establishes that the specifics of the landlord's claim are disputed. Tenants frequently have (or, with fair procedures, could develop) evidence to disprove the landlord's claim. For example, tenants may have, or be able to develop on cross-examination or by subpenas, evidence that the landlord has no intention of moving (as petitioner Buckawyn claimed), or that the landlord is proceeding with retaliatory motives (as petitioner Genuard claimed), or that the landlord's personal circumstances demonstrate that he does not have an immediate and compelling necessity for the apartment (as petitioners Jack and Grace Keeler claimed). (See plaintiffs' statements under local rule 9(g).)

Judge Tenney erred in concluding that the landlord's credibility is not a "critical issue" in assessing good faith (A-22). "Good faith" in these circumstances

is not established by its mere assertion by the landlord. Asco Equities v. McGoldrick, 285 A.D. 381, 384, 137 N.Y.S.2d 446, 449 (1st Dept. 1955), aff'd, 309 N.Y. 738 (1955). Relevant factual issues to be determined by the Commissioner may include whether the landlord failed to offer comparable vacant apartments to the tenants, see R. Lyons Hickey, Inc. v. Commissioner of Department of Rent, 58 A.D.2d 773, 396 N.Y.S.2d 847 (1st Dept. 1977), aff'd. 44 N.Y.2d 879 (1978); whether the landlord's existing accommodations are larger than the apartment allegedly sought, see Alabau v. State of New York Division of Housing, 26 N.Y.2d 917, 310 N.Y.S.2d 101 (1970); whether the landlord failed to occupy comparable vacant housing; see Reres v. Gabel, 19 A.D.2d 724, 725, 242 N.Y.S.2d 650, 652 (2d Dept. 1963); whether the landlord is ill, see Horbay v. Joy, 59 A.D.2d 892, 399 N.Y.S.2d 50

(2d Dept. 1977); whether the landlord's family is overcrowded, see Keller v. Coster, 274 A.D. 932, 83 N.Y.S.2d 751 (2d Dept. 1948); or whether the landlord has a retaliatory motive in making the application; see Volpicelli v. Leventhal, 48 A.D.2d 660, 367 N.Y.S.2d 541 (2d Dept. 1975).

There is no way such issues can be fairly resolved without an opportunity for an oral evidentiary hearing before the decision maker. The Commissioner's procedures do not provide such opportunity. Even when an oral conference is held,* it is not

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* The statute does not require a conference but permits the proceeding to be limited to the filing of briefs and written evidence. N.Y.C. Admin. Code §Y51-8.0c; New York City Rent Control Regulations, §85, 97. See also Deposition of Daniel Joy, p.20. While it appears to petitioners that at least one "conference " generally is held, there is an issue of fact as to whether these are (footnote continued on next page)

conducted before the decision maker but before a hearing examiner who makes a recommended decision, which is not shown to the parties. The decision maker does not have a full record for decision. Further, the Commissioner's examiners permit the landlord to speak through his attorney, without requiring him to testify directly, may deny cross examination, and may accept evidence without notice to the tenants. The tenants' allegations that all the above situations routinely occur are supported by the

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(footnote continued from preceding page)

in any sense oral hearings. Judge Kearse points to one instance where the rent examiner met separately with the landlord and tenant (A-38). Even if both parties appear at the same time, however, the absence of cross-examination, acceptance of evidence after the hearing without notice to the adverse parties, and failure to record the conference for the decision-maker renders the conferences constitutionally deficient.

record* and of course must be presumed true for the purpose of granting summary judgment against them. See Arnett v. Kennedy, 416 U.S. 134, 136 (1974).

In Goldberg v. Kelly, another case involving termination of a statutory benefit, this Court held that welfare benefits could not be terminated, even temporarily, without a full trial-type hearing including "an effective opportunity to defend by confronting any adverse witnesses," 397 U.S. at 268, see also, Willner v. Committee on

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* For example, Charles Rabin, who conducts "protest" proceedings, agreed that a representative could make a statement on behalf of a party who was not present (Rabin deposition, p.15) and that while he was orally instructed not to accept ex parte evidence, he did not know it to be a strict requirement (Rabin deposition, p.19). Commissioner Joy admitted affidavits were accepted ex parte in the Keeler case (Joy deposition, p.124).

Character and Fitness, 373 U.S. 96 (1963) (right to confront and cross-examine adverse witness in bar character committee proceeding).

Further, even were documentary submissions constitutionally permissible, it denies due process to consider these submissions without notice to the tenant. "[T]he Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation," Bowman Transportation, Inc. v. Arkansas-Best Freight System, 419 U.S. 281, 288, at fn. 4 (1974).

2. Due Process requires adequate notice to tenants before issuance of a Certificate of Eviction.

Certiorari should be granted to allow the Court to pass on the important issue of whether notices, such as the ones at issue here, which are sent to individuals of widely varying degrees of literacy and

education, meet due process requirements. The notice at issue here consists of a copy of the landlord's application for a Certificate of Eviction. It is accompanied by a form letter stating an application has been made, that the tenant may file a written answer on an enclosed form, that failure to answer may result in the District Rent Director granting a Certificate of Eviction, but that the tenant is not required to move until ordered to do so by a court.

The notice does not indicate what the issues are in a Certificate of Eviction proceeding, and thus the tenant receiving such notice has no way of knowing from the notice on what grounds the Certificate of Eviction may be opposed, if at all. Moreover, as the dissent below points out, the notice is misleading because while it states (correctly) that a tenant is not required to move until ordered to by a

court, it does not advise the tenant that he or she will not be allowed to address the merits of the proposed eviction in court and that, to avoid eviction, the tenant must successfully contest the issuance of a certificate at the administrative level.

The majority opinion below finds the notices adequate, apparently because the answers filed by the tenants here were "consistently responsive" (A-7); the concurrence, while conceding the notices "are not models of clarity and draftsmanship" asserts that tenants may "glean" from the documents some idea of the issues (A-10). But as the dissent points out, the Commissioner himself characterized the responses of some tenants as "token barren responses," and it is "entirely possible" that the notices, rather than adequately informing tenants, lull tenants into sleeping on their rights (or saving their resources) in a false

belief that their eviction will be litigated in court (A-36).

In Goldberg v. Kelly, this Court recognized that the "opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard." 397 U.S. at 268-269. In Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1 (1978), this Court noted that since "due process" calls for such procedural protections "as the particular situation demands," the characteristics of the recipients of a particular notice are relevant. This Court found a challenged utility termination notice, which "may well have been adequate under different circumstances," not adequate for "thousands of customers of various levels of education, experience, and resources," 436 U.S. at 14, fn. 15. This Court held the notice must "apprise the affected individual of, and permit

adequate preparation for, an impending 'hearing,'" Id. [Emphasis added.]

The notice at issue here does not permit tenants to prepare for a hearing, because they do not know what the issues are. The notice does not tell the tenants what factors are relevant to making a determination. As the tenants have alleged (and again this factual allegation must be presumed to be true in view of the disposition of this case on summary judgment), most tenants, including the petitioners here, do not understand what to do when an application for a Certificate of Eviction is made. In case after case, tenants neither know what is at stake nor what the issues are. The Keelers are an example. They presented evidence of their own personal and financial problems which, however pathetic, are legally irrelevant to the grant or denial of a Certificate of

Eviction. Certiorari should be granted to clarify the minimal constitutional requirements for adequate notice under circumstances such as these.

3. The granting of summary judgment against the tenants here has so far departed from the accepted and usual course of judicial proceedings to call for an exercise of this Court's power of supervision.

The tenants here, believing their version of the nature of the Commissioner's administrative procedure was documented by the pre-trial discovery they had completed, moved for summary judgment. The district court sua sponte granted summary judgment to the other side, resolving all of the factual disputes against the tenants. As the dissent points out, in assessing the plaintiff tenants' motion, "the court was required to resolve all ambiguities and draw all legitimate inferences against the plaintiffs. But it could not then

use those unfavorable resolutions and inferences to justify entry of judgment against plaintiffs as a matter of law." (A-32). (Emphasis added.)

The majority opinion in the Court of Appeals, in affirming, approves this unusual procedure and holds that since the trial court resolved issues of fact against the tenants, there were no issues of fact. For example, on the disputed issue of whether cross-examination of opposing witnesses is denied, Judge Moore in his majority opinion finds that cross-examination is always permitted:

> The trial court implicitly found that there was no genuine issue of fact here when it found that tenants may question opposing witnesses (A-6).

But resolving a factual issue against the tenants, as the district court did, is simply not equivalent to finding that there is no issue of fact. Both Judge Kearse's

dissenting opinion and Judge Tenney's opinion concurring with the majority opinion agree that there are disputed issues of fact. Furthermore, as the dissent points out, the record belies Judge Moore's (and the district court's) description of the procedures. Tenants provided case histories of instances in which cross-examination was denied, as for example, where the landlord whose good faith was at issue failed to appear for the conference (A-52), or where the tenant and landlord appeared for a conference separately (A-50, 51), or where the landlord submitted evidence ex parte without notice to the tenants (A-39), or where inspections and interviews of opposing witnesses were conducted without notice to the tenant either before or after the interview (A-39). In the face of the tenants' evidence in support of their contentions, it was error to resolve factual

issues against them by summary judgment. See, United States v. Diebold, Inc., 369 U.S. 654, 655 (1962) (per curiam). In light of the important constitutional issues at stake, exercise of this Court's supervisory power is required to correct the lower court's egregious departure from principles governing summary judgment. This case should be remanded for trial to allow petitioners an opportunity to show that the Commissioner's procedures are as petitioners describe, and deny them due process.

CONCLUSION

For the above reasons, a writ of *certiorari* should issue to review the order of the United States Court of Appeals for the Second Circuit in this case.

Dated: July 7, 1981

Respectfully submitted,

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APPENDICES

APPENDIX A — Opinions of the United States Court of Appeals for the Second Circuit.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 117-118—September Term, 1980

(Argued September 24, 1980 Decided February 9, 1981)

Docket Nos. 80-7359, 7362

JACK KEELER and GRACE KEELER, EMILY RAMOS, ROSE MANN, JOHN NICHOLS, ETHEL MCGINNITY, WILMA and JOHN HILBER, individually and on behalf of all others similarly situated,

Plaintiffs,

JACK KEELER and GRACE KEELER,

Plaintiffs-Appellants,

—against—

DANIEL W. JOY, individually and as Commissioner of the Office of Rent and Housing Maintenance of the City of New York Department of Housing Preservation and Development,

Defendant-Appellee.

FAY GENUARD, MARGARET J. LENNON and PATRICIA BUKAWYN, individually and on behalf of all others similarly situated,

Plaintiffs,

—and—

RALPH GULVINO, MARGARET SZAL, ELIZABETH KRAVITZ, LEE FAGIN, ILONA LOVAS, CATHERINA STOLFI, JOHANNA ROTKEWICZ and ANGELO CRISCIO,

Plaintiffs-Intervenors,

RALPH GULVINO, ELIZABETH KRAVITZ, LEE FAGIN, CATERINA STOLFI and ANGELO CRISCIO,

Plaintiffs-Intervenors-Appellants,

—against—

DANIEL W. JOY, individually and as Commissioner of the Office of Rent and Housing Maintenance of the City of New York Department of Housing Preservation and Development,

Defendant-Appellee.

Before:

MOORE and KEARSE, *Circuit Judges,* and TENNEY,* *District Judge.*

Appeal from the entry of summary judgment against plaintiffs brought in the United States District Court for the Eastern District of New York before the Honorable Thomas C. Platt, *Judge,* on plaintiffs' challenge to the constitutional adequacy of New York City hearing and notice procedures by which a landlord may evict a tenant and reclaim a rent controlled apartment for his own use.

Affirmed.

* Honorable Charles H. Tenney, United States District Judge for the Southern District of New York, sitting by designation.

FLORENCE R. ZIMMERMAN, New York, NY (Harry Michelson, Esq., of counsel) *for Defendant-Appellee.*

TOBY GOLICK, New York, NY (Legal Services for the Elderly, John C. Gray, Jr., Patrick Cooney, Thomas P. Kerrigan, of counsel; and The Legal Aid Society, Brooklyn, NY, Marshall Green, and Brooklyn Legal Services Corporation B, on the brief), *for Plaintiffs-Appellants.*

MOORE, *Circuit Judge*:

New York City's Rent and Rehabilitation Law, Title Y, § 51-1.0 *et seq.*, Administrative Code of the City of New York, prescribes a procedure through which a landlord, seeking to reclaim a rent controlled apartment for his own use, may, by application to the City, evict a tenant. The issue in this case is whether the notice and conference afforded a tenant by the City satisfy the demands of due process. The trial court held that they do and granted summary judgment for the City against the tenants.[1] We affirm.

BACKGROUND

The relevant part of the Rent and Rehabilitation Law provides that a landlord is entitled to the issuance of a

[1] Two cases were brought against Daniel W. Joy individually and as Deputy Commissioner, (1) by Jack Keeler, et al. in the Eastern District of New York and (2) by Fay Genuard et al. in the Southern District of New York. The Genuard case was transferred to Judge Platt in the Eastern District and a single opinion (489 F.Supp. 568) was delivered and a single judgment entered thereon dismissing plaintiffs' complaints. From this judgment the respective plaintiffs appeal.

certificate of eviction by the District Rent Director where the "landlord seeks in good faith to recover possession of a housing accommodation because of immediate and compelling necessity for his own personal use and occupancy or for the use and occupancy of his immediate family; provided, however, that where the housing accommodation is located in a building containing twelve or less housing accommodations and the landlord does not reside in the building and the landlord seeks in good faith to recover possession for his own personal use and occupancy, an immediate and compelling necessity need not to be established. . . ." § 51.6.0(b).

A landlord seeking a certificate of eviction must file a two-page application with the City. Item ten of the application asks the landlord to state the relationship to the landlord of the person for whom occupancy is sought, if occupancy is sought for a member of the landlord's immediate family. Item twelve of the application states:

> "If your necessity is based on poor health, submit medical proof of disability with this application and describe below the period and nature of disability. Your doctor may be required to appear and give oral testimony."

Item thirteen asks the landlord to:

> "State fully below any additional facts which indicate that there exists an immediate and compelling necessity for personal use and occupancy by you or members of your immediate family. . . . If housing accommodations are located in a building containing twelve or less housing accommodations and you do not reside in the building and you seek to recover possession for your own personal use, an immediate and compelling necessity need not be established".

The application notes above the landlord's signature that: "Application is hereby made for a certificate of eviction based upon the facts herein above stated".

After receiving the landlord's application, the District Rent Director must mail the tenant a copy of the application and a notice of the commencement of eviction proceedings. The notice states, among other things, that:

> "Attached hereto is a copy of the application for a certificate filed by your landlord. The facts set forth in the application may entitle him to such certificate of eviction under the rent regulations. You are hereby afforded an opportunity to oppose this application by filing an answer."

A review of the anwers filed by tenants shows that almost all of the answers argue that the landlord does not really seek to reclaim the apartment for his own use but is merely seeking a higher rent for the apartment.

The next step is the holding of a conference by a hearing officer in the District Rent Director's office. Both the landlord and the tenant are notified of the conference and informed that "Both landlord and tenant may be represented by counsel and may bring with them witnesses and written evidence in support of their contentions". At the conference the tenant may question opposing witnesses. No transcript of the conference is made. The hearing officer provides the District Rent Director with a written report on the conference. The District Rent Director then decides whether facts militating eviction have been established, and, if they have, issues a certificate of eviction. The report of the hearing officer to the District Rent Director is made available to the parties after the District Rent Director's decision has been made. Any mistakes or omissions in the report can be raised in subsequent proceedings.

If a certificate of eviction is issued by the District Rent Director, the tenant may file a protest with the Commissioner of the Department of Rent and Housing Maintenance. In a protest proceeding, the Commissioner reviews all of the evidence in the record, considers the matter *de novo,* and makes a decision. A tenant may, on denial of a protest, bring an Article 78 proceeding in the New York State Supreme Court.

I.

Appellants contend that the conference procedures are constitutionally inadequate. They allege three defects.

The tenants first argue that they are denied the right to cross-examine opposing witnesses. The trial court implicitly found that there was no genuine issue of fact here when it found that tenants may question opposing witnesses. Plaintiffs' own statement under Rule 9(g) noted the City's policy that, in these conferences, both "sides should be given an opportunity to state their case and to cross examine witnesses".

The tenants' second quarrel is with the fact that the report of the hearing officer at the conference to the District Rent Director is not available to the parties until after the District Rent Director has made his decision. Yet this complaint has little merit. To allow the parties a second chance to speak by allowing them to respond to this internal memo before the District Rent Director made a decision would only complicate and delay the proceedings without enhancing the fairness of the process to any significant extent. Moreover, any unfairness that might result from serious mistakes or omissions in the report can be raised in the protest proceeding or in an Article 78 proceeding.

Third, the tenants argue that the lack of a transcript of the conference violates due process. They argue that the District Rent Director cannot properly appraise the evidence taken by the hearing officer without a transcript. The District Rent Director, does, however, receive a written report on each conference from the hearing officer.

The conference procedures thus provide plaintiffs with "the opportunity to be heard 'at a meaningful time and in a meaningful manner', *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965)," *Matthews v. Eldridge,* 424 U.S. 319, 333 (1976), and so meet the requirements of due process.

II.

Appellants argue that the notice of the conference fails to adequately inform the tenants of the issues upon which the decision on eviction will turn; that in these proceedings helpless tenants neglect key issues and argue irrelevancies; that the tenants' proper defenses are unasserted and lost; and that the tenants' legal rights are thus trampled. Yet the record shows that this disturbing vision of the eviction proceedings is chimerical.

In fact, these proceedings are fair to the tenants. The notice and attached application give the tenants an accurate view of the issues upon which the proceedings will turn. The record shows that the answers filed by the tenants are consistently responsive to the issues upon which the proceedings will turn. Finally, the landlord must make his case in conference before both the tenant and the hearing officer. Not only the tenant but also the hearing officer have an opportunity to probe the landlord's good faith. The failure to provide for a trial-type hearing in the rent agency is not proof that the tenant is *ipso facto* deprived of due process.

The decision of the District Court is affirmed.

The author of this opinion is also in agreement with Judge Tenney's well-reasoned, and well-written concurring opinion.

TENNEY, *D.J.*:

Although I concur with the decision reached by Judge Moore, I think it necessary to respond to the objections raised in the dissent and to further explore the legal principles governing this case. I therefore prefer to express my views in a separate concurrence.

Issues of Fact

Summary judgment should not be granted where there are unresolved issues as to any material fact and the district court must resolve all ambiguities and draw all inferences in favor of the party opposing the motion. *SEC v. Research Automation Corp.*, 585 F.2d 31, 33 (2d Cir. 1978); *Fournier v. Canadian Pac. R.R.*, 512 F.2d 317, 318 (2d Cir. 1975); Fed. R. Civ. P. 56(c). While constitutional issues should not be decided on an incomplete factual basis, "summary judgment may be rendered . . . where the record is adequate for the constitutional question presented and there is no genuine issue of material fact." 6 Moore's Federal Practice ¶ 56.17[10], at 56-772 to 776 (2d ed. 1976); *see, e.g., Roe v. Wade*, 410 U.S. 113 (1973); *Board of Regents v. Roth*, 408 U.S. 113 (1973); *Gotkin v. Miller*, 514 F.2d 125 (2d Cir. 1975); *Beal v. Lindsay*, 468 F.2d 287 (2d Cir. 1972).

In Judge Kearse's view, summary judgment should not have been granted in this case because material factual issues were disputed. First, she contends, material issues exist regarding the adequacy of the notice give to the

tenant by the rent control agency. Second, she states that many questions remain unanswered with respect to the tenant conferences. I disgree with Judge Kearse's first conclusion and find that no genuine factual issues remain concerning the notice provision. And while I agree that certain facts about the tenant conferences are disputed, I do not think these issues, as reflected by the record below, rise to constitutional proportions and I therefore find them not material.

1. *Notice*

Each tenant-plaintiff in this action received a document entitled Notice of Commencement of Eviction Proceedings Before The District Rent and Rehabilitation Director ("Notice"). This Notice states:

> Attached hereto is a copy of an application for a certificate of eviction filed by your landlord. The facts set forth in the application may entitle him to such certificate of eviction under the provisions of the rent regulations.
>
> You are hereby afforded an opportunity to oppose this application by filing an answer thereto upon the answer forms enclosed herewith. The original of your answer must be sworn to before a notary public or other person authorized to administer oaths and must be returned to this office together with one copy, within seven days from the date appearing at the bottom of this notice.
>
> If you fail to file an answer opposing the application within the time limit specified above, the District Rent and Rehabilitation Director may grant a certificate of eviction.

The landlord's application form attached to the Notice states the request for a Certificate of Eviction is based on "occupancy by landlord or immediate family." The application asks for the name of the person for whom the apartment is sought and provides a space for the landlord's "further statement" explaining why the apartment is needed. The application's directions essentially embody the New York City Rent & Eviction Regulation ("Regulation") that authorizes eviction in such cases. Item 12 directs the landlord to list facts indicating "an immediate and compelling necessity for personal use and occupancy" and states that such a necessity need not be established if the apartment is located in a building containing twelve or fewer accommodations. Therefore, although the substance of the Regulation is not described in the tenant's Notice, it can be gleaned from the landlord's application attached to the Notice.

According to the dissent, the most troublesome aspect of the Notice is the boldface legend that appears on the bottom and states: "THIS IS NOT AN EVICTION NOTICE. YOU ARE NOT REQUIRED TO MOVE UNTIL ORDERED BY A COURT." Judge Kearse argues that tenants do not realize the significance of the Notice and may be lulled into the false belief that the eviction issue will be litigated in court and not resolved by the agency that sent the Notice. In her view, neither this Notice nor the Notice of Conference that follows "informs the tenant that the merits of his conviction will be conclusively determined before he gets to the court." The Notice could thus create a "misimpression" or cause a tenant to "sleep on his rights." The dissent therefore concludes that "material issues" remain unresolved and that the adequacy of the Notice cannot be determined on a motion for summary judgment.

I do not think that summary judgment is precluded by the question of whether the Notice misleads tenants and causes them to make only a token response to the landlord's application. The adequacy of the Notice must be determined by applying the legal standard that has been established in comparable due process cases. This standard, described below, can be applied to the Notice on its face because it does not demand that court know the precise impact an announcement or document makes in every instance. While the specifics of a given case may be instructive or even necessary under certain circumstances, I find that, on its face, the Notice challenged here does not deprive the tenants of due process. This conclusion rests on a legal determination that would not be disturbed by the resolution of certain unanswered—but in my view not material—factual questions.

In the frequently cited case of *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314 (1950), the Supreme Court stated that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *See, e.g., Wolff v. McDonnell*, 418 U.S. 539, 564 (1974); *Morrissey v. Brewer*, 408 U.S. 471, 486-87 (1972); *In re Gault*, 387 U.S. 1, 33 (1967). As more recently described by the Court, "[t]he purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for, an impending hearing." *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 14 (1978). In *Memphis Light*, the Supreme Court found inadequate a utility company's final notice which stated that the customer's payment was overdue and that service

would be terminated if payment was not made on a certain date. According to the Court, "[n]o mention was made of a procedure for the disposition of a disputed claim," although flyers distributed to customers informed them in a general fashion that billing problems could be discussed with someone at the utility company's office. *Id.* at 13.

In contrast to the final notice challenged in *Memphis Light,* the Notice at issue here expressly informs the tenant that he can oppose the landlord's application by filing an answer. The Notice also states that a Certificate of Eviction may be issued if no answer is filed. This document, therefore, is certainly sufficient to apprise the tenant of the pendency of the action and to afford him an opportunity to present objections. *See Mullane v. Central Hanover Trust Co., supra,* 339 U.S. at 314. Furthermore, this is not the only information the tenant receives regarding his ability to contest the landlord's application. The Notice of Conference sent to each tenant states that the parties may be represented by counsel and may bring witnesses and written evidence to support their contentions. This announcement also informs the tenant that failure to appear at the conference "may be considered a default and may result in a determination based upon the evidence in the record." This information, along with the initial Notice and the accompanying landlord's application, allows for "adequate preparation" for the conference. *See Memphis Light, Gas & Water Div. v. Craft, supra,* 436 U.S. at 14.

The tenant-plaintiffs in this action argue that the Notice is inadequate because it does not explain what the relevant issues are or describe what factors are important in making the eviction determination. Similarly, plaintiffs contend that the subsequent Notice of Conference does

not cure this deficiency because it does not explain what contentions the witnesses and written evidence should support. Most tenants, therefore, simply present evidence of their own personal and financial hardships which, unfortunately, is largely irrelevant to the issue at hand. Finally, plaintiffs argue that even the Certificate of Eviction fails to inform the tenants of the grounds on which the Certificate can be challenged if a protest is filed with the Commissioner of the Department of Rent and Housing Maintenance ("Commissioner").

Undoubtedly, the notices challenged here are not models of clarity and draftsmanship and could be easily improved. That, however, is not the standard which this Court must apply. Due process demands that the tenants be informed of their right to object to the landlord's application and that they can adequately prepare for this opportunity. The initial Notice and Notice of Conference satisfy that demand because the relevant information can be gleaned from the documents, additional questions or misunderstandings may be resolved at the conferences, and the Notice of Conference indicates that inquiries may be made beforehand. Accordingly, I conclude that the notices involved in these proceedings do not violate constitutional requirements.

2. *Tenant Conferences*

The court below rejected the plaintiffs' argument that they were constitutionally entitled to a hearing prior to eviction. As noted by the district court, a hearing may be granted on request or sua sponte in the discretion of the District Rent Director. Furthermore, the court stated:

> the conferences before the hearing examiner, which are concededly always held, are adequate to satisfy

due process in these proceedings. Tenants may, after all, request and obtain subpoenas for and/or produce witnesses, exhibits, affidavits (all of which are considered) inspect opposing papers and other materials and question opposing witnesses and/or present and file material in rebuttal.

489 F. Supp. at 573. I agree with Judge Kearse's view that the record evidences disputed issues of fact and does not fully support the district court's statements. As noted by the dissent, unanswered or disputed questions remain regarding the availability of a subpoena and a tenant's right to cross-examine witnesses, to inspect documents, and to file rebuttal material. Judge Kearse also questions whether the plaintiffs ever conceded that conferences were always held. As she points out, the record indicates that in the case of Fay Genaurd, the rent examiner met separately with the tenant and the landlord. I have less difficulty, however, accepting the proposition that a conference was made available for each of the tenant-plaintiffs in this action. The Commissioner's evidence supports his assertion that separate meetings were held with Mrs. Genaurd and her landlord because of confusion over dates that resulted from granting several adjournments to both parties. Mrs. Genaurd was granted an oral hearing when she filed a protest from the rent examiner's decision, but this hearing was never held because she has already vacated the apartment. The other tenants in this action did participate in some type of proceeding before the rent examiner. The question is not whether these proceedings constituted a conference per se, but whether they deprived the tenants of due process of law by failing to provide an adequate opportunity to challenge the bases of the landlord's claims.

The extensive record in this case describes the general procedures followed in each plaintiff's case. The district court, therefore, was hardly in the dark with respect to these proceedings. Of course, certain questions of fact remain unresolved, particularly those mentioned by Judge Kearse and reiterated above. And on a motion for summary judgment, all ambiguities and inferences must be resolved in favor of the party opposing the motion. Yet even construing these issues in the light most favorable to the plaintiffs' case, I find no unconstitutional infirmity with the procedures provided for in New York City's Regulations and implemented in the manner reflected by this record. For the reasons discussed below, I conclude that the procedures afforded the tenants in this action did not fall below what process was due.

Due Process

The tenant-plaintiffs in this case, who have been forced to vacate their apartments under adverse circumstances and extreme hardship, raise many serious considerations in challenging the system that allows for their eviction. The fact remains, however, that the right at issue here—the right to avoid eviction from a privately owned building—is granted solely by statute and can thus be similarly limited. *Cf. Kovarsky v. H.D.A.*, 31 N.Y.2d 184, 335 N.Y.S.2d 383 (1972) (New York City Rent Stabilization Law does not arbitrarily limit a more extensive right but rather creates only certain limited rights that tenants did not previously have). In *Arnett v. Kennedy*, 416 U.S. 134, 154 (1976), the Supreme Court stated, "where the grant of a substantive right is inextricably intertwined with the limitations on procedure which are to be employed in determining that right, a litigant . . . must take the bitter with the sweet." Here, the tenant's statutorily defined

right is not an abstract guarantee against eviction in the absence of the landlord's "good faith" need. Rather, it is a guarantee enforced and limited by the procedures the City has prescribed for determining whether the landlord in "good faith" seeks to recover the apartment for his own or his family's personal use. *See id.* at 152,

This does not mean, however, that this statutory right can be revoked in a manner inconsistent with due process requirements or that the City's procedures are immune from constitutional challenge. As subsequently explained by the Supreme Court, the *Arnett* decision "concluded that because the employee could only be discharged for cause, he had a property interest which was entitled to constitutional protection." *Bishop v. Wood,* 426 U.S. 341, 345 n.8 (1976). Indeed, six members of the *Arnett* Court adhered to the proposition that "the adequacy of statutory procedures for deprivation of a statutorily created property interest must be analyzed in constitutional terms." *Arnett v. Kennedy, supra,* 416 U.S. at 134 (Powell, J., concurring in an opinion joined by Blackmun, J.); *id.* at 211 (Marshall, J., dissenting in an opinion joined by Douglas and Brennan, JJ.); *see Bishop v. Wood, supra,* 426 U.S. at 345 n.8. In this case, the tenant's right to an apartment can be terminated upon a showing that the landlord truly intends to use it for himself or his family. As described in Judge Kearse's dissent, because the landlord's freedom to evict the tenant is conditioned upon "good faith," the tenant must have an opportunity to contest this issue "at a meaningful time and in a meaningful manner." *Mathews v. Eldridge,* 424 U.S. 319, 333 (1976), *quoting Armstrong v. Manzo,* 380 U.S. 545, 552 (1965); *see Memphis Light, Gas & Water Div. v. Craft, supra,* 436 U.S. at 11 ("Because petitioners may terminate service only 'for cause,' respondents assert

a 'legitimate claim of entitlement' within the protection of the Due Process Clause.") (footnote omitted). Upon reviewing the procedures followed here in light of the interests at stake, I have concluded that the Regulations provide for "such procedural protections as the particular situation demands." *Mathews v. Eldridge, supra,* 424 U.S. at 334.

Three factors should be considered in identifying the "specific dictates" of due process: (1) the private interests affected; (2) the risk of an erroneous deprivation and the probable value of additional safeguards; and (3) the government's interest, in light of the function performed and the fiscal or administrative burdens that additional safeguards would entail. Id. at 335. In contrast to many other cases in which this tripartite analysis has been applied, the instant action involves *two* sets of private interests, the tenant's and the landlord's. The government is not trying to terminate a benefit or privilege but rather is seeking to make a limited factual finding that will determine the respective rights of each party. The tenants in this case are sympathetic plaintiffs who certainly have a substantial interest in retaining their apartments. But the interests of the landlords, who own the property and seek to recover the apartment for their own or their family's personal use, cannot be denigrated. *See Lindsay v. Normet,* 405 U.S. 56, 72-74 (1972). Indeed, by providing that a landlord can evict a tenant under these circumstances, the legislature has weighed the interests at stake and struck what it perceived to be the appropriate balance. The court should not attempt to disturb the scale, which appears to be reasonably well-balanced, and the interests of the landlord and the tenant in these proceedings should be viewed as comparable.

The issue that must be determined by the rent examiner is whether the landlord, "in good faith," seeks to recover the apartment for his own use or for the use of his immediate family. Plaintiffs contend that the conferences deny due process in the following ways: ex parte evidence may be accepted and cross-examination denied, the parties are not allowed to see the examiner's recommended decision, and no transcript of the proceeding is made available to the parties or to the official who makes the ultimate eviction decision. I do not think, however, that the additional safeguards sought by the plaintiffs would so enhance the accuracy of the final determination as to significantly reduce the risk of an erroneous deprivation. Plaintiffs argue that the Keeler case bears out their contentions but I find that it actually supports the opposite view. Plaintiffs complain that vital evidence in the Keeler case—an affidavit executed by the landlord's relative, a birth certificate establishing the family relationship, and a rent agency inspector's report—were submitted without notice to the tenant and without providing the tenant with an opportunity to cross-examine witnesses. Because the landlord was requested by the examiner to provide the first two documents, plaintiffs claim that the landlord, in contrast to the tenants, was specifically advised of what evidence he needed to make out his case. Yet the fact that the examiner requested these documents and an inspection report, even though the tenants never challenged the validity of the landlord's claim, indicates that the examiner conducted a thorough and independent inquiry. The tenants raised no factual issues regarding the substance of the landlord's application; they did not content that the apartment was sought for a non-relative or that the proposed occupant was not truly in need. The examiner, however, sought to verify these claims through

documentary evidence to satisfy himself of the landlord's good faith. It is difficult to imagine what could have been gained by cross-examination or submission on notice in light of the narrow and easily verifiable factual inquiry made by the examiner.

This view is equally applicable to the other individual cases involved in this action. The record reveals that the documents submitted in other cases were generally doctors' statements or title papers that essentially spoke for themselves. The "witnesses," who were usually the parties, the proposed occupant, and an occasional attorney, were questioned by the examiner in an informal setting. Even accepting plaintiffs' contention that cross-examination is denied, I cannot agree that it is constitutionally required in these proceedings. "[D]ifferences in the origin and function of administrative agencies 'preclude wholesale transplantation of the rules of procedure, trial, and review which have evolved from the history and experience of courts.' " *Mathews v. Eldridge, supra,* 424 U.S. at 348, *quoting FCC v. Pottsville Broadcasting Co.,* 309 U.S. 134, 143 (1940). A full scale evidentiary hearing is neither a mandatory, nor even the most effective, method of decisionmaking under all circumstances. *Id.* Rather, the procedures should be tailored to fit "the capacities and circumstances of those who are to be heard." *Goldberg v. Kelly,* 397 U.S. 254, 268-69 (1970).

The dissent argues that "[s]ince good faith is a central issue, and often will require an assessment of a landlord's credibility, a decision on the basis of a paper record would seem to be 'a particularly inappropriate way' to decide whether or not a certificate should issue. *Califano v. Yamasaki,* 442 U.S. 682, 696-97 (1979)." As noted in the dissent, however, the Commissioner does not rely on the provision in the rent control law that states that a pro-

ceeding may be limited "to the filing of affidavits, or other written evidence and the filing of briefs." Title Y, § Y 51-8.0. And while the plaintiffs point out that even informal conferences are not mandatory, it appears that some kind of conference was held with each of the tenant-plaintiffs in this action. Therefore, the issue, in my view, is not whether a purely paper record is sufficient but whether "good faith" can be accurately determined through the procedures followed in these cases. Upon reviewing the record, I conclude that these application and conference procedures, along with the availability of an administrative and judicial appeal, provide ample opportunity to assess the validity of the landlord's claim and his credibility.

In *Califano v. Yamasaki, supra,* the Supreme Court examined the procedures followed by the Secretary of the Department of Health, Education and Welfare in seeking to recover erroneous overpayments made to beneficiaries of certain insurance programs. After a recipient was notified that an overpayment had been made, he could request a reconsideration of that determination pursuant to section 204(a) of the Social Security Act. Or, the recipient could request that recoupment be waived in accordance with section 204(b) which provides that there shall be no recovery from "any person who is without fault if such adjustment would defeat the purpose of [the Act] or would be against equity and good conscience." The Supreme Court held that no oral hearing was required for a reconsideration request under section 204(a) because it involved "relatively straightforward matters of computation for which written review is ordinarily an adequate means to correct prior mistakes." 442 U.S. at 696. The Court also held, however, that written review was inadequate to make a waiver of determination under

section 204(b). According to the Court, fault depends on an evaluation of 'all pertinent circumstances' including the recipients' 'intelligence . . . and physical and mental condition' as well as his good faith. 20 CFR §404.507 (1978)." *Id.* at 697. In the Court's view, these factors cannot be "evaluated absent personal contact between the recipient and the person who decides his case" because "evaluating fault . . . usually requires an assessment of the recipient's credibility, and written submissions are a particularly inappropriate way to distinguish a genuine hard luck story from a fabricated tall tale." *Id.*

Two main distinctions exist between the action at bar and the *Yamakasi* case upon which the plaintiffs and the dissent rely. First, although the "good faith" determination involved here is not merely a matter of computation, it is more susceptible to objective proof than the question of fault. The rent control law does not expressly define the meaning of "good faith." New York courts, however, have elaborated upon the issue. The New York cases establish that "[t]he administrative inquiry into good faith should be restricted to a search for the landlord's honest intention to gain possession for his own use." *Berlinrut v. Leventhal,* 43 A.D.2d 522, 525, 349 N.Y.S.2d 82, 83 (1st Dep't 1973); *see Rosenbluth v. Finkelstein,* 300 N.Y. 402, 405 (1949); *McCabe v. Gabel,* 22 A.D.2d 939, 255 N.Y.S.2d 993 (2d Dep't 1964). The landlord's good faith cannot be impeached on the ground that he could have occupied another apartment in the building that was not subject to the rent control law. *Berlinrut v. Leventhal, supra; McCabe v. Gabel, supra.* According to the record in this case, the tenant does not usually dispute the specifics of the landlord's claim that he or a member of his family intends to occupy the apartment. Furthermore, facts regarding ownership of the building or the family

relationship are generally supported by independent documentary evidence. The conferences, therefore, do not appear to be a vehicle for weighing one party's word against another's and the landlord's credibility is not as critical an issue as it might first appear. Furthermore, the landlord's claims can always be subject to more stringent scrutiny by the examiner or the Commissioner if specific factual allegations are questioned or challenged. In contrast to the fault inquiry involved in *Yamasaki,* the rent examiner is not really attempting to distinguish between an actual "hard luck story" and a "fabricated tall tale."

The second way in which this case differs from *Yamasaki* is that decisions were not rendered against these tenant-plaintiffs without any personal contact by the examiner who made the initial recommendation. In contrast to *Yamasaki,* some type of conference was held in each of these cases and the eviction decision did not rest solely on a paper record. Conferences were also held for some of the protest proceedings initiated by tenant-plaintiffs. The *Yamasaki* Court approved of a procedure, instituted by the Secretary after the lawsuit was filed, whereby recipients were afforded "a short personal conference with an impartial employee of the Social Security Administration at which time the recipient present[ed] testimony and evidence and cross-examine[d] witnesses, and the administrative employee question[ed] the recipient." *Id.* The Court did not suggest, however, that cross-examination was necessary or required. Indeed, the issue-specific and flexible analysis employed by the Court confirms that every due process case should be carefully examined in light of the factual determination to be made, the evidentiary factors that must be reviewed, the characteristics of the parties, and the role played by the decision-maker. Consideration of these factors leads me

to conclude that more formal procedures are not necessary in the case at bar to accurately assess the landlord's "good faith."

The plaintiffs claim that they were denied due process because they were not apprised of the examiner's recommended decision which must be approved and adopted by his superiors before an order granting eviction would be issued. I find this claim to be without merit. The government has no duty to inform parties of every internal recommendation when ample opportunities for appeal are provided. Furthermore, the additional burdens created by such a procedure outweigh any incidental benefit that might result on the tenants' behalf. The examiners fill out conference reports which include a summary of the evidence, a progress sheet, and their recommendations. It does not appear that a formal "decision" that could be distributed to the parties is ever drafted by the examiner and such an extra step does not appear warranted. Furthermore, if the parties were able to comment on the recommendation before it was adopted or rejected, they would, in effect, be given an additional chance to take an appeal. The rent control law provides that a protest can be filed after an order is issued and judicial review is also available. The tenant, therefore, is already provided with one administrative and one judicial appeal. The extra step requested would constitute an unnecessary burden.

The plaintiffs also contend that due process requires that the conferences be recorded stenographically or by tape. According to the plaintiffs, a complete record or transcript is necessary so that the ultimate decision-maker who is not present at the conference can know precisely what occurred. I disagree with this contention. As recently stated by the Second Circuit in *Yaretsky v. Blum*, 629 F.2d 817, 822 (2d Cir. 1980), "neither the Constitution

nor New York law requires the administrative decision-maker in an appeal from a hearing officer recommendation to read (or listen to) the entire transcript (or tape recording) of the hearing before issuing an administratively final decision, whether favorable or adverse to the claimant." In *Yaretsky*, the Second Circuit distinguished and narrowly interpreted the two cases relied upon by the plaintiffs, *Morgan v. United States*, 298 U.S. 468 (1936) ("*Morgan I*") and *Ostrowski v. City of New York*, 601 F.2d 629 (2d Cir. 1979), to the point where plaintiffs' reliance is misplaced. 629 F.2d at 823-25 & nn. 4, 6. And while plaintiffs quote the statement in *Morgan I* that "[t]he one who decides must hear," 298 U.S. at 481, Judge Friendly has observed that "the life of this aspect of Morgan I was extremely brief. In Morgan IV [*United States v. Morgan*, 313 U.S. 409 (1941)] Mr. Justice Frankfurter, writing for a Court unanimous on this point, took back most or all of what the first decision had given." *National Nutritional Foods Assoc. v. FDA*, 491 F.2d 1141, 1144 (2d Cir. 1974). Indeed, the Second Circuit has endorsed the view propounded by Professor Davis that:

> Since the only purpose of sifting and analyzing of evidence by subordinates is to save the time of the deciding officers, this necessarily means that deciding officers may "consider and appraise" the evidence prepared by reading a summary or analysis prepared by subordinates. The Supreme Court thus did not require in the First Morgan case that deciding officers must read all the evidence or even that they must directly read any of it.

2 Davis, Administrative Law § 11.03 at 44-45 (1958) (footnotes omitted), *quoted in Yaretsky v. Blum, supra*, 629 F.2d at 823.

The plaintiffs' argument that a conference transcript is constitutionally required is, therefore, unfounded. Furthermore, any party that wishes to memoralize the conference can provide his own recording equipment. *See Knowlson v. Joy*, 78 Civ. 2685 (S.D.N.Y. Feb. 23, 1979) (not officially reported). It is true that this option is not likely to occur to an unrepresented tenant or may not be financially feasible. Yet it would be unduly burdensome to force the City to assume this chore when a transcript is neither constitutionally required nor likely to be relied upon in most cases. Except in rare cases, it does not appear that the interests of the parties or the decision-maker will be promoted by imposing this additional administrative and fiscal burden.

Conclusion

While summary judgment should not be granted freely in actions raising important constitutional claims, the district court properly awarded judgment to the Commissioner in this case. No genuine factual disputes exist with respect to the notice provisions and the notice provided is not constitutionally inadequate. And although some unanswered questions may remain regarding the conference procedures, these issues are not material in that they fail to rise to constitutional proportions. Even viewing all unresolved issues in the light most favorable to the plaintiffs' claims, I find that the procedures conform to due process requirements. A full blown evidentiary hearing is not constitutionally required and the tenants are given an opportunity to be heard, to present evidence, and to appeal from an adverse decision. Furthermore, the examiner who renders the initial recommendation serves as an impartial arbiter who conducts a thorough and independent inquiry into a narrow factual issue. While

"good faith" connotes credibility, this determination rests in large part on verifiable documentary evidence whose probative value can be measured in the absence of cross-examination.

The procedures followed here constitute an attempt to give all the parties a chance to air their views without creating a cumbersome and formal process leading to a trial-type hearing. *Cf. Matter of Colton v. Berman,* 21 N.Y.2d 322, 333, 287 N.Y.S.2d 647, 654-55 (1967) (no evidentiary or quasi-judicial hearing required for valuation determination for "the avowed purpose of successive rent control statutes has always been to avoid protracted valuation proceedings . . . in the light of the millions of rental units to be regulated and the burden such proceedings would place on landlords and tenants of small or low-rent properties."). Of course, if the tenant remains dissatisfied with the administrative determination or believes that an error was committed, an Article 78 proceeding may be instituted in New York Supreme Court. For those individual cases where an abuse of discretion occurs, an appeal to the state court is the appropriate remedy as opposed to the restructuring of administrative procedures by a federal court. *See Eisen v. Eastman,* 421 F.2d 560 (2d Cir. 1969), *cert. denied,* 400 U.S. 841 (1970), while this latter avenue may have to be pursued in cases where it is the only viable recourse, the action at bar does not fall within that category. Accordingly, I vote to affirm the decision below.

KEARSE, *Circuit Judge* (Dissenting):

This appeal arises from two lawsuits[1] by tenants of rent controlled apartments in New York City against the Com-

[1] *See* majority opinion, footnote 1 *ante.*

missioner of the City's Office of Rent and Housing Maintenance ("Commissioner"), challenging the constitutional adequacy of the procedures under which the landlord of such an apartment may evict a tenant in order to reclaim use of the apartment. The district court granted summary judgment for the Commissioner against the plaintiff tenants ("Tenants") on the ground that the procedures prescribed and used are adequate. In my view the existence of disputes as to material facts made the granting of summary judgment inappropriate. Accordingly, I would reverse.

I

The New York City Rent and Rehabilitation Law ("rent control law"), Title Y, §§ Y 51-1.0 to Y 51-18.0 of the Administrative Code of the City of New York, adopted pursuant to the local Emergency Housing Rent Control Act, N.Y. Unconsol. Laws § 8601 *et. seq.* (McKinney 1974), provides two means by which a landlord may evict a tenant from a rent controlled apartment. If the tenant has failed to pay the rent or has been guilty of other tenant misconduct,[2] the landlord may immediately commence an eviction proceeding in the Civil Court of the City of New York. § Y 51-6.0(a); *see* N.Y. Real Prop. Acts. § 701 *et seq.* (McKinney 1979). In order to evict for a reason other than nonpayment of rent or tenant misconduct, a landlord must obtain from the city rent control agency a certificate of eviction ("Certificate"), which will permit him to proceed in Civil Court. Once the Certificate is obtained, no attack by the tenant on its merits is

2 Misconduct includes such acts as permitting a nuisance, occupying the apartment illegally, and refusing unreasonably to allow the landlord access to the apartment.

permitted in court. It is the procedure involved in obtaining the Certificate that is challenged in the present case.

The rent control law provides in pertinent part as follows:

> The city rent agency shall issue such an order [granting a Certificate] whenever it finds that:
>
> (1) The landlord seeks in good faith to recover possession of a housing accommodation because of immediate and compelling necessity for his own personal use and occupancy or for the use and occupancy of his immediate family; provided, however, that where the housing accommodation is located in a building containing twelve or less housing accommodations and the landlord does not reside in the building and the landlord seeks in good faith to recover possession for his own personal use and occupancy, an immediate and compelling necessity need not to be established; . . . .

§ Y 51-6.0 (b)[3] This general statutory scheme is the subject of New York City Rent and Eviction Regulations

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[3] The other circumstances in which § Y 51-6.0(b) provides that a Certificate shall be issued, which are not directly involved in this appeal, are as follows:

> (2) The landlord seeks in good faith to recover possession of a housing accommodation for which the tenant's lease or other rental agreement has expired or otherwise terminated, and at the time of termination the occupants of the housing accommodation are subtenants or other persons who occupied under a rental agreement with the tenant, and no part of the accommodation is used by the tenant as his dwelling; or
>
> (3) The landlord seeks in good faith to recover possession of a housing accommodation for the immediate purpose of substantially altering or remodeling it, provided that the landlord shall have secured such approval therefor as is required by law and the city rent agency determines that the issuance of the order granting the certificate of eviction is not inconsistent with the purpose of this title; or

(footnote continued on following page)

("Regulations"). The Tenants contend that the procedures as they have actually developed through regulation

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(4) The landlord seeks in good faith to recover possession of housing accommodations for the immediate purpose of demolishing them, and the city rent agency determines that such demolition is to be effected for the purpose of constructing a new building, provided that:

(a) If the purpose of such demolition is to construct a new building containing housing accommodations, no certificate of eviction shall be granted under this paragraph (4) unless such agency determines that such new building will contain at least twenty per centum more housing accommodations consisting of self-contained family units (as defined by regulations issued by such agency, with due regard for the shortage of housing accommodations suitable for family occupancy and for the purposes of this title in relation thereto) than are contained in the structure to be demolished; except, however, that where as a result of conditions detrimental to life or health of the tenants, violations have been placed upon the structure containing the housing accommodations by any agency of the city having jurisdiction over such matters and the cost of removing such violations would be substantially equal to or would exceed the assessed valuation of the structure, the new building shall only be required to make provision for a greater number of housing accommodations consisting of self-contained family units (as so defined by regulation) than are contained in the structure to be demolished; and

(b) The city rent agency shall, by regulation, as a condition to the granting of certificates of eviction under this paragraph (4), require the relocation of the tenants in other suitable accommodations, provided that the city rent agency may, by regulation, authorize the granting of such certificates as to any tenants or classes of tenants without such requirement of relocation, where such exemption will not result in hardship to such tenants or classes of tenants and will not be inconsistent with the purposes of this title; and

(c) The city rent agency may, by regulation, in order to carry out the purposes of this title, impose additional conditions to the granting of certificates of eviction under this paragraph (4), including, but not limited to, the payment of stipends to the tenant by the landlord in such amounts and subject to such variations and classifications as such agency may determine to be reasonably necessary; and

(d) No certificate of eviction shall be issued pursuant to this paragraph (4) unless the landlord shall have secured such ap-

and practice involve four levels of bureaucracy: (1) a "Rent Examiner" will review the landlord's application for a Certificate, may collect such evidence as he deems necessary by seeking additional documentation or by holding an informal conference or a trial-type hearing, and will then make a recommendation to (2) the District Rent Director, who makes the decision whether or not to grant the Certificate; the losing party may then file a protest with the office of the Commissioner, which is evaluated by (3) a "protest attorney" who reviews the record and may collect such additional evidence as he deems necessary, and sends proposed findings and an order to (4) the Commissioner, who has no knowledge of any particular grievance unless he is personally contacted by one of the parties. Following the Commissioner's decision on the protest, the aggrieved party may seek judicial review in an Article 78 proceeding in New York Supreme Court. Regulations § 102; N.Y. Unconsol. Laws § 8608 (McKinney).

Plaintiffs claim that the procedures for determination of the landlord's entitlement to a Certificate, both as written and as applied, deprive them of due process. They contend, *inter alia*, that the notice initially given to a tenant is inadequate to disclose the issues involved; that the Rent Examiner sometimes makes his recommendations on the basis of ex parte presentations; that no right to subpoena witnesses is recognized; that no right to cross examine the landlord is assured; that trial-type hearings are never held; that although a conference between landlord and tenant is usually held by the Rent Examiner,

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proval as is required by law for the construction sought to be effected, and the city rent agency determines that the issuance of such certificate is not inconsistent with the purpose of this title.

no transcript is made and the Examiner's report, consisting of his notes as to what he regards as relevant statements, is not available to the parties prior to the District Rent Director's acting on it.

Following commencement of the present lawsuits, plaintiffs moved for a preliminary injunction against eviction pending trial of any disputed issues of fact.[4] While that motion was sub judice plaintiffs conducted discovery of the rent control agency, including depositions of the Commissioner and certain members of his staff. Plaintiffs then moved for summary judgment, relying in part on deposition testimony as to the actual practices in the agency.

The district court determined that plaintiffs were not entitled to summary judgment and that, instead, the Commissioner was entitled to judgment as a matter of law. After reviewing the statutory provisions, the regulations, and the submissions of the parties, the court found, *inter alia,* that the notice provided is adequate; that adequate conferences are always held, with the tenants having the right to obtain subpoenas, question witnesses and inspect any documentary evidence; and that there is little need for a recording or transcript of the conference.

II

The requirements for granting summary judgment are well established. There must be "no genuine issue as to any material fact," and a party must be "entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Summary judgment is a harsh remedy which should be reserved for cases in which the requirements of the Rule

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[4] Plaintiffs also sought class certification pursuant to Fed. R. Civ. P. 23 to permit them to represent all other tenants similarly situated.

are clearly satisfied. *Flli Moretti Cereali v. Continental Grain Co.*, 563 F.2d 563, 565 (2d Cir. 1977). *See Heyman v. Commerce & Industry Insurance Co.*, 524 F.2d 1317, 1319-20 (2d Cir. 1975). A court should resolve all ambiguities and draw all reasonable inferences in favor of the party against whom summary judgment may be granted. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (per curiam); *Quinn v. Syracuse Model Neighborhood Corp.*, 613 F.2d 438, 445 (2d Cir. 1980).

In the present case plaintiffs moved for summary judgment. Their contention that there were no issues of material fact to prevent entry of judgment in their favor, however, did not bar them from asserting the existence of issues of fact sufficient to prevent entry of judgment as a matter of law against them. *Walling v. Richmond Screw Anchor Co.*, 154 F.2d 780, 784 (2d Cir.), *cert. denied*, 328 U.S. 870 (1946). Thus, in assessing *plaintiffs'* motion, the court was required to resolve all ambiguities and draw all legitimate inferences against the plaintiffs. But it could not then use those unfavorable resolutions and inferences to justify entry of judgment against plaintiffs as a matter of law. In order to determine whether the *Commissioner* is entitled to judgment as a matter of law, any disputes as to material facts must be resolved in favor of the Tenants.

A. *The Substantive Framework*

At the outset, a brief overview of the substance of plaintiffs' claim is necessary in order to assess the materiality of the facts that plaintiffs contend are in dispute. The question of eviction from a rent controlled building is not a dispute between the tenant and a governmental agency; it is a dispute between private persons, with a governmental agency as the arbiter. The rights of a tenant to prevent eviction are given by the rent control statute,

and those rights exist only to the extent that they are so given. *Cf. Kovarsky v. H.D.A.*, 31 N.Y.2d 184, 335 N.Y.S.2d 383 (1972). To the extent that the rights are given, the tenants cannot, consistently with principles of due process, be deprived of them without "the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976), quoting from *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 11-12 (1978); *Arnett v. Kennedy*, 416 U.S. 134, 166-67 (1974) (Powell, J., concurring); *id.* at 177-78, 185 (White, J. concurring and dissenting); 211 (Marshall, J., dissenting). Plaintiffs contend that due process entitles them to a trial-type hearing with all its common appurtenances. The Commissioner appears to concede that the tenants are entitled to some opportunity to be heard, but contends that the tenants' right to due process are satisfied by the conference procedures.

Without attempting to decide at this point precisely what kind of opportunity due process requires, it must be recognized that the portion of the statute here in question allows an eviction principally when the landlord "in good faith" seeks to recover the apartment for his own personal use and occupancy, or for the use and occupancy of his immediate family because of immediate and compelling necessity. Thus the statute conditions the right of the landlord to evict not on the circumstances of the tenant, but on the "good faith" intentions of the landlord.[5] Since

[5] Plaintiffs have proffered the affidavits of a housing policy consultant and a social scientist and referred extensively to a report prepared for the Office of Rent and Housing Maintenance entitled "Rental Housing in the City of New York, Supply and Condition 1975-1978" (January 1979). These sources are the basis of plaintiffs' many assertions as to the rent control tenants' age and financial condition and the emotional hardships they would undergo if forced to relocate. The limited rights granted by the rent control law do not appear to turn on these factors.

good faith is a central issue, and often will require an assessment of a landlord's credibility,[6] a decision on the basis of a paper record would seem to be "a particularly inappropriate way" to decide whether or not a certificate should issue.[7] *Califano v. Yamasaki*, 442 U.S. 682, 696-97 (1979). I believe the court is required to assess whether the conference and/or hearing procedures provide rent control tenants with a meaningful opportunity to test the landlord's credibility in order to contest the issue of his good faith.

B. *The Issues of Material Fact*

The overall problem I find in the district court's decision in the present case, is that it either ignored or decided

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6 I note, in passing, that the Commissioner has denied plaintiffs' assertion that

> [w]hether a landlord is entitled to a Certificate of Eviction inevitably involves a determination of factual as well as legal issues. The factual issues include issues of the credibility, and intentions of the landlord.

(*Keeler* plaintiffs' statement pursuant to Rule 9(g). ¶ 16 (see note 9 *infra*)). This denial may bespeak a constricted view of the rights granted by the statute and suggest a tolerance for procedures that may be inadequate to protect those rights.

7 In assessing the adequacy of the procedures for issuance of the Certificate on the basis of the landlord's good faith personal or family needs, therefore, little reliance should be placed on the provision of § Y 51-8.0 that "any proceedings under this section may be limited by the city agency to the filing of affidavits, or other written evidence and the filing of briefs." It does not appear that the Commissioner places great reliance on this section. Certainly he asserts that face-to-face confrontations are always held (*see* Part B *infra*).

On the other hand, the meaning of "good faith" in subparagraph (2) of § Y 51-6.0(b), *see* note 3 *supra*, is not apparent. No particular purpose is required of the landlord, and all of the factors mentioned there appear to relate to prior acts of the tenant and to be capable of objective determination. A landlord's application under subparagraph (2) would be far less dependent on his credibility and thus be more susceptible to a decision on the basis of a paper record.

adversely to plaintiffs certain factual disputes as to how the procedures actually operate, and their likely effect on the tenant's opportunity to challenge the landlord's good faith.[8] Without expressing a view as to the ultimate merits of plaintiffs' claims, I find factual disputes as to virtually all stages of the procedures in question.

First, it appears that there were material issues as to the adequacy of the notice given to a tenant by the rent control agency. The feature of the initial notice that I find immediately striking is the following boldface legend:

> TO THE TENANT: THIS IS NOT AN EVICTION NOTICE. YOU ARE NOT REQUIRED TO MOVE UNTIL ORDERED BY A COURT

It does not appear that either this notice or the Notice of Conference which follows it informs the tenant that in order to avoid eviction he must successfully contest the issuance of a Certificate *at the administrative level,* and he will not be allowed to address the merits of the proposed eviction in court. Plaintiffs contend that tenants do not realize the significance of the notices they receive from the agency. They contend for example, that most

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[8] In addition, the court appears to have drawn unwarranted inferences with respect to the procedural provisions as written, reading certain permissive provisions as mandatory. For example, the court quoted Regulation § 97 in part as follows:

> Within a reasonable time after the filing of the protest and answers, if any, the Commissioner *may:*
>
> * * * * *
>
> f. Grant or order a *hearing,*

(emphasis in district court opinion), and concluded that "the regulations provide for a hearing on request of either party. . . ." 489 F. Supp. at 574; *see also id.* at 572. The provision that the Commissioner "*may* . . . grant *a hearing*" does not mean that he *must* do so if a party request.

tenants are not represented at the agency conferences; the Commissioner denies this (*Keeler* 9(g) Statement ¶ 30, and response).[9] Considering the Commissioner's characterization of the response of certain plaintiffs as a "token barren response", (response to *Keeler* 9(g) Statement ¶¶ 49, 50), it is entirely possible that the legend quoted above may lull many tenants into the false belief that the question of their eviction will be litigated in court, not in the administrative agency from which the notice was sent. And it may well be that this misimpression is not adequately dispelled by the later conference notice stating that the tenant may be represented by counsel and may bring witnesses and written evidence, and that failure to appear "may result in a determination based upon the evidence in the record." So far as appears, nothing informs the tenant that the merits of his eviction will be conclusively determined *before* he gets to the court. It appears that a tenant may be similarly lulled into sleeping on his right to file a protest to the Commissioner on the District Rent Director's decision to issue a Certificate. The "Order Granting Certificate of Eviction," which states that such a protest may be filed, also states as follows:

> NOTICE TO TENANT: This certificate does not order you to move, but only authorizes court action

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9 Rule 9(g) of the *General Rules* of the United States District Court for the Southern and Eastern Districts of New York requires that a notice of motion for summary judgment be accompanied by a "short and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried." The papers opposing the motion must include a statement of the material facts allegedly in dispute. Assertions of fact in the moving party's 9(g) Statement that are not controverted by the opposing party's 9(g) Statement are deemed admitted. Here, separate statements pursuant to Rule 9(g) were filed by the plaintiffs in the *Keeler* and *General* actions.

> to be brought for your eviction or removal. The issuance of this certificate does not affect your rights under any present rental agreement.

The district court found that the notices given were adequate. I find it difficult to believe that these questions were appropriately dealt with on summary judgment.

Turning to the actual conduct of conferences, my principal objections to the district court's decision result from his findings that

> the conferences before the hearing examiner, which are concededly always held, are adequate to satisfy due process in these proceedings. Tenants may, after all, request and obtain subpoenas for and/or produce witnesses, exhibits, affidavits (all of which are considered) inspect opposing papers and other materials and question opposing witnesses and/or present and file material in rebuttal.

489 F. Supp. 568, 573. Contrary to this statement, I observe in the record many issues as to which material facts appear either to be in dispute or simply not to support these findings; these include (1) whether conferences are always held, (2) whether tenants may obtain subpoenas, (3) whether tenants are always permitted to inspect opposing papers, (4) whether tenants are always permitted to question opposing witnesses, and (5) whether tenant are always permitted to file rebuttal material.

(1) *Are conferences always held?* It is far from clear that, as the district court supposed, this has been conceded by plaintiffs. The *Keeler* plaintiffs' 9(g) Statement ¶ 21 asserted that the conferences are not mandatory; the Commissioner denied this and went on to assert that "a

conference/hearing is held in every eviction proceeding . . . ." Plaintiffs did not respond to the Commissioner's assertion; but they were not required to respond, since the Commissioner did not cross move for summary judgment with his own statement as to facts allegedly not in dispute.[10] Moreover, since plaintiffs elsewhere pointed to an instance when the Rent Examiner met only *separately* with the tenant and with the landlord (see "(3) and (4)" below), one would suppose that plaintiffs would not concede that conferences are always held.

(2) *Does the tenant have the right to subpoena?* Plaintiffs asserted that "[t]here are no procedures available for the issuance of administrative subpoenas when so requested by any party, although the agency has authority to issue such subpoenas." The Commissioner denied this. (*Keeler* 9(g) Statement ¶ 26(i), and response.) On deposition, the Commissioner and his Senior Rent Examiner testified that they did not know of any procedure for procuring a subpoena.

(3) and (4) *Are the tenants permitted to question opposing witnesses and inspect their documentary submissions?* Plaintiffs have pointed to instances in which they were denied the opportunity to question the landlord: for example, when the landlord appeared at the conference and questioning by the tenant was curtailed (Ramos Affidavit), or when the landlord did not appear but sent his attorney in his stead (*Genuard* 9(g) Statement ¶ 10), or when the Rent Examiner held separate conferences for the tenants and the landlord (*Genuard* 9(g)

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10 A cross motion is not, of course, necessary in order to entitle the nonmoving party to summary judgment in his favor, assuming the undisputed facts so warrant. *Lowenschuss v. Kane*, 520 F.2d 255, 261 (2d Cir. 1975).

Statement ¶ 7). As to two of these incidents, the Commissioner both denied that they occurred, and attempted to explain away the significance of their occurrence (*see* responses to *Genuard* 9(g) Statement ¶¶ 7, 10). Plaintiffs have pointed also to other ex parte collection of evidence by the Rent Examiner. They asserted, for example, that after a conference with the Keelers and their landlord, the Examiner, without giving notice to the Keelers, conducted an inspection of the premises and questioned the landlord's relative in the absence of the Keelers, and received from the landlord additional documents of which the Keelers were never given copies and never notified. The Commissioner both denied that these events occurred, and asserted that the Examiner proceeded in this way because the Keelers' opposition theretofore had been so weak (*Keeler* 9(g) Statement ¶ 47, and response).

(5) *Are the tenants permitted to file rebuttal material?* The fair inference from the proffered fact that the tenants are not always notified of materials filed against them is that they do not always have the opportunity for rebuttal.

Finally, the district court's conclusion that there is little need for a recording or transcript of the conference also seems a premature finding of fact. For example, one plaintiff asserted that at the conference she had challenged the landlord's good faith need of her apartment on the grounds that there was already a vacant apartment in the building that the landlord could use instead of evicting her; there was no mention of any alleged vacancy in the Rent Examiner's report. (Ramos Affidavit.) The combination of no transcript and an incomplete report may be highly significant, especially if the Examiner's report is not available to the parties for review prior to the District Rent Director's decision. Is it available? Plaintiffs say it is

not; the Commissioner says it is (*Keeler* 9(g) Statement ¶ 26(j), and response). The deposition testimony of the Senior Rent Examiner supports plaintiffs' assertion.

On the basis of these and other material facts that the record reveals are in dispute I conclude that the Commissioner was not entitled to judgment as a matter of law. Consequently I would reverse the granting of summary judgment and remand for trial.

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APPENDIX B

Opinion of the District Court for the Eastern District of New York, Dated March 27, 1980

MEMORANDUM AND ORDER

PLATT, District Judge.

The above-captioned cases commenced in separate districts (the Keeler case in this district on January 8, 1979 and the Genuard case in the Southern District on May 21, 1979) challenge the New York City Rent and Rehabilitation Law, Title Y, §§ 51-1.0 et seq., Administrative Code of the City of New York ("City Rent Control Law") claiming that said Law does not afford procedural due process to tenants in rent controlled apartments prior to eviction on grounds other than non-payment of rent or certain acts of misconduct. Specifically, plaintiffs

claim that they are entitled to a "trial-type hearing" with adequate notice, a transcript of the proceedings and a personal consideration or review of the transcript by the ultimate administrative decision maker. They also complain that tenant plaintiffs are not timely or properly advised as to their rights as to counsel and are not given an opportunity to review recommendations and reports.

Plaintiffs seek to bring these actions as a class action on behalf of all others similarly situated and seek declaratory and injunctive relief. They have moved for (i) a preliminary injunction restraining the New York City Rent Commissioner from issuing certificates of eviction and staying all such certificates issued after July 1, 1978 pending the determination of this action, (ii) class action certification and

(iii) summary judgment.

The proceedings as to and the manner of treatment of each plaintiffs' and intervening plaintiffs' cases are different and the merits with respect to each undoubtedly bear little or no resemblance to one another, but this need not concern us here. Our inquiry is whether the City Rent Control Law violates the procedural due process, if any, to which tenant plaintiffs are entitled.

The City Rent Control Law prescribes the circumstances under which a landlord may be entitled to a certificate of eviction (N.Y.C. Admin. Code § Y 51-6.0(b):

> Subject to the provisions of paragraph (3) of subdivision c of section Y 51-13.0 of this title [relating to the termination of state rent control jurisdiction], no tenant shall be removed or evicted on grounds other than those stated in subdivision a of this section

relating to evictions without a Certificate of Eviction] unless on application of the landlord the city rent agency shall issue an order granting a certificate of eviction in accordance with its rules and regulations designed to effectuate the purposes of this title, permitting the landlord to pursue his remedies at law. The city rent agency shall issue such an order whenever it finds that:

(1) The landlord seeks in good faith to recover possession of a housing accommodation because of immediate and compelling necessity for his own personal use and occupancy or for the use and occupancy of his immediate family; provided, however, that where the housing accommodation is located in a building containing twelve or less housing accommodations and the landlord does not reside in the building and the landlord seeks in good faith to recover possession for his own personal use and occupancy, an immediate and compelling necessity need not be established; or

(2) The landlord seeks in good faith to recover possession of a housing accommo-

dation for which the tenant's lease or other rental agreement has expired or otherwise terminated, and at the time of the housing accommodation are subtenants or other persons who occupied under a rental agreement with the tenant, and no part of the accommodation is used by the tenant as his dwelling; or

(3) The landlord seeks in good faith to recover possession of a housing accommodation for the immediate purpose of substantially altering or remodeling it, provided that the landlord shall have secured such approval therefor as is required by law and the city rent agency determines that the issuance of the order granting the certificate of eviction is not inconsistent with the purpose of this title; or

(4) The landlord seeks in good faith to recover possession of housing accommodations for the immediate purpose of demolishing them, and the city rent agency determines that such demolition is to be effected for the purpose of constructing a new building, provided that the landlord

comply with requirements relating to the number of new units and relocating tenants]

* * * * * *

Section Y 51-8.0 subd. c of said Law provides that

"Any proceedings under this section may be limited * * * to the filing of affidavits, or other written evidence, and the filing of briefs * * *." (Emphasis added).

Section 55 of the New York City Rent & Evictions Regulations promulgated under Title Y of Chapter 51 provides that:

"Sec. 55. Occupancy by landlord or immediate family

a. A certificate shall be issued where the landlord seeks in good faith to recover possession of a housing accommodation because of immediate and compelling necessity for his own personal use and occupancy, or for the use and occupancy of his immediate family * * * As used in this paragraph, the term "immediate family" includes only a son, daughter, grandson,

granddaughter, stepson, stepdaughter, father, mother, father-in-law, mother-in-law, grandfather, grandmother, stepfather or stepmother."

With respect to the procedure for obtaining a certificate of eviction, section 85 of said Regulations provides that:

> At any stage of a proceeding the District Rent Director may:
>
> a. Reject the application if it is insufficient or defective.
>
> b. Make such investigation of the facts, hold such conferences, and require the filing of such reports, evidence, affidavits, or other material relevant to the proceeding, as he may deem necessary or appropriate.
>
> c. Forward to or make available for inspection by either party any relevant evidence and afford an opportunity to file rebuttal thereto.
>
> d. For good cause shown, accept for filing any papers,

even though not filed within the time required by these Regulations.

e. Require any person to appear or produce documents, or both, pursuant to a subpoena issued by the Administrator.

f. Consolidate two or more applications or proceedings which have at least one ground in common.

g. Forward to either party a notice of action proposed to be taken by the District Rent Director.

h. Grant or order a hearing, except that no multiple tenant initiated proceeding for reduction in rents in a building may be determined without a hearing, (Emphasis added)

* * * * * *

I

Pursuant to these Regulations, a landlord first applies for a certificate of eviction by filing an application on a special form with the District Rent

Director setting forth factual grounds therefor.[1]

Pursuant to Regulation 83, the District Rent Director mails a copy of the application and a Notice of Commencement of Eviction Proceedings before the District Rent Director. The Notice states, among other things:

> "Attached hereto is a copy of an application for a certificate filed by your landlord. The facts set forth in the application may entitle him to such certificate of eviction under the provisions of the rent regulations. You are hereby afforded an opportunity to oppose this application by filing an answer * * * If you fail to file an answer opposing the application within the time limit specified above, the District Rent Director may grant a certificate of eviction.

To the Tenant: This is not an Eviction Notice. You Are Not Required to Move Until Ordered By A Court."

Plaintiffs' first complaint is that the Notice given to them is "inadequate" in that it does not indicate what the legal grounds are for the issuance or denial of a certificate of eviction or who must prove what, and it does not contain a notice or suggestion that tenant should obtain counsel or assistance.

In this Court's view this objection is without merit. It is not the purpose of this or any other Notice of a pending proceeding to advise the parties of their rights, defenses, etc., nor to advise them with respect to the burden of proof on different issues. In the great majority of cases no such information is ever required in a summons and/or complaint in a State or Federal Court

action. The Notice and the annexed application are clear as to the purpose of the proceeding, i. e., to evict the tenants from the premises in which they are living; further, the Notice sets forth the facts in support of eviction and refers specifically to the "rent regulations." The Notice and application forms are clearly adequate for these purposes.

Even if it be assumed that these documents are not sufficient to alert a tenant to the need for counsel or other assistance, a tenant is specifically so informed in the notice of conference which follows almost immediately and which provides that "both landlord and tenant may be represented by counsel . . .".

II

As noted above, Section 85 of the Regulations provides in pertinent part:

> "At any stage of a proceeding the District Rent Director may:
> * * * * * *
>
> b. Make such investigation of the facts, hold such conferences, and require the filing of such reports, evidence, affidavits, or other material relevant to the proceeding, as he may deem necessary or appropriate.
> * * * * * *
>
> h. Grant or order a hearing, except that no multiple tenant initiated proceeding for reduction in rents in a building may be determined without a hearing.
> * * *" (Emphasis added).

Thus, the second step in the process is for the District Rent Director (if he does not reject the landlord's application as insufficient or defective) to send to the tenants a "notice of conference" which significantly provides,

inter alia, that

> "Both landlord and tenant may be represented by counsel and may bring with them witnesses and written evidence in support of their contentions."

Notwithstanding this provision and Section 85(h) of the Regulations set forth above, plaintiffs complain that they are entitled to and are not given a "hearing" under these Regulations and defendants' procedures.[2]

On their face the procedures provided in the Regulations do not support this claim. They appear to be perfectly fair and reasonable. In the discretion of the District Rent Director a hearing may be granted on request or sua sponte.

Nonetheless, plaintiffs claim that "in practice, no real hearing is held." Assuming arguendo that any bona fide request for a hearing would necessarily be inevitably and arbitrarily

denied, the conferences before the hearing examiner, which are concededly always held, are adequate to satisfy due process in these proceedings. Tenants may, after all, request and obtain subpoenas for and/or produce witnesses, exhibits, affidavits (all of which are considered) inspect opposing papers and other materials and question opposing witnesses and/or present and file material in rebuttal.

Despite all this, tenant-plaintiffs complain that due process is not satisfied because no tape recording or stenographic transcript of the proceedings at the conference is provided by the District Rent Director. There is nothing, however, to prevent the tenant-plaintiffs for making such a recording or transcript of their own. See

Knowlson v. Joy, etc., Docket No. 78 Civ. 2685 (S.D.N.Y.1979) (Knapp, J.).

Moreover, absent a formal hearing, there would appear to be little need for a recording or a transcript. A cursory examination of the examiner's report in the Keeler case, for example, reveals the appearance of the landlords, Mr. and Mrs. Feliciano, their attorney, the landlady's mother, and the tenant; statements by the landlord and the tenant; a tentative decision by the examiner to "hold" for (i) affidavit of the mother, (ii) proof of the relationship of the mother and daughter, and (iii) an inspection of the mother's present premises. The tenant's statement claims only present hardship but makes no challenge to the mother's doctor's statement, the immediate compelling necessity of the application,

or the good faith of the landlords.

When the examiner obtained (i) an affidavit of the mother that she was such and that she would in good faith move into the apartment, (ii) a birth certificate of the mother's daughter (the landlady), and (iii) an inspection report as to the mother's present residence, all issues of fact had been resolved and there was no need for any further conference or any hearing.

III

The third step in the process is for notice to be given to the tenant of the issuance of an order of eviction and of the tenant's right to file a protest to the Commissioner of the Department of Rent and Housing Maintenance. In the Keeler case the tenants did so stating

that tenants' lack of counsel at the District Rent Office "influenced the hearing officer" against them and that "it is obvious the landlord seeks to evict me as (sic) to get a higher rental for his apartment." Significantly, the Keelers at this juncture were represented by counsel, indeed the same counsel who represent them in this case.

Section 97 of the Regulation provides as follows with respect to the proceedings before the Commissioner:

> Within a reasonable time after the filing of the protest and the answers, if any, the Commissioner may:
>
> a. Reject the protest if it is insufficient or defective.
>
> b. Make such investigation of the facts, hold such conferences, and require the filing of such reports, evidence, affidavits, or other material relevant to the proceeding,

as he may deem necessary or appropriate.

c. Forward to or make available for inspection by either party any relevant evidence and afford an opportunity to file rebuttal thereto.

d. For good cause shown accept for filing any papers, even though not filed within the time required by these Regulations.

e. Require any person to appear or produce documents or both pursuant to a subpoena issued by the Commissioner.

f. Grant or order a hearing. (Emphasis added).

Again the regulations provide for a hearing on request of either party or on an order issued sua sponte by the Commissioner. Following the receipt of a protest and the landlord's answer, the Commissioner reviews all of the evidence in the record, considers the matter "de novo" and makes a decision.

Tenant-plaintiffs complain, however, that since these and the District conferences are not conducted by the Commissioner who makes the ultimate decision, and he does not have a recording or transcript, but only notes and a report of an examiner, the proceedings are necessarily constitutionally deficient. They also say that because the examiner does not provide the parties with a copy of his report, they are denied the right to correct the same. As to these alleged deficiencies, the reports are a matter of public record and available to both parties for use in connection with their protest papers and would necessarily be available if either party requested a conference or hearing before the Commissioner. The fact that the Commissioner relies on the notes and the report of the

examiner (when no transcript has been made) does not render the same constitutionally deficient. Knowlson v. Joy, supra.

IV

In addition to these proceedings, which collectively consist of at least three separate notices, two opportunities to be heard and present affidavits, witnesses and exhibits, an initial and a separate "de novo" consideration of the merits, adequate records of the proceedings themselves, an opportunity to make a more complete record of the same, and a decision with reasons for the same, a tenant-plaintiff, on denial of his or her protest, may bring an Article 78 proceeding in the State Supreme Court and obtain a further review there. Due process in

many cases requires far less; (Cf. Argo v. Hills, 425 F.Supp. 151 at 158, 159 (E.D.N.Y.1977) and cases cited therein), in these cases it requires no more.

DISCUSSION

In a motion for a preliminary injunction, such as this,

> "there must be a showing of possible irreparable injury and either (1) probable success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief. Selchow & Righter Co. v. McGraw-Hill Book Co., No. 77-7569, slip op. at 3533, 3537, 580 F.2d 25 at 27 (2d Cir. 1978); Triebwasser § Katz v. American Telephone & Telegraph Co., 535 F.2d 1356, 1358 (2d Cir. 1976); see Mulligan, Forward -Preliminary Injunction in the Second Circuit, 43

Brooklyn L.Rev. 831, 832-33 (1977)."

Caulfield v. Board of Education of City of N. Y., 583 F.2d 605 at 610 (2d Cir. 1976). See also Whelan v. Colgan, 602 F.2d 1060 (2d Cir. 1979) and Ives Laboratories, Inc. v. Darby Drug Co. Inc., 601 F.2d 631 (2d Cir. 1979).

It must also be borne in mind that since only the constitutionality of the procedures used under the City Rent Control Law are in question here, our jurisdiction does not require us to undertake a consideration of the merits of every action taken by the Commissioner here. "Such review properly remains in the jurisdiction of the appropriate state courts." Cf. Escalera v. New York City Housing Authority, 425 F.2d 853, at 864, 865 (2d Cir.), cert. denied, 400 U.S. 853, 91 S.Ct. 54, 27 L.Ed.2d 91 (1970).

Reduced to its simplest form, plaintiffs' claim is that they have a constitutionally protected property interest in the form of a right to renew their leases indefinitely, a right of which they may not be deprived without due process of law. This question, however, has already been decided adversely to the plaintiffs by the New York Court of Appeals in Kovarsky v. H. D. A., 31 N.Y.2d 184, 335 N.Y.S.2d 383, 286 N.E.2d 882 (1972). There, the Court of Appeals dismissed claims of tenants that the City Rent Control Law gave them the right to indefinite renewal of their leases and that this right could not be limited in the same law by provision for conversion to co-operative ownership upon purchase by a minority (35%) of the tenants, stating (31 N.Y.2d at 193, 335 N.Y.S.2d at 389, 286 N.E.2d at 886):

"Appellants' argument is premised on the contention that the RSL gives them the right to indefinite renewal of their leases and this right cannot constitutionally be limited in the same law by a provision for conversion to co-operative ownership upon purchase by a minority (35%) of the tenants. Appellants ignore, however, the fact that prior to the passage of the RSL, they possessed no rights at all to renewal leases, and that the enactment of the RSL granted them only certain limited rights. Included is the right to the renewal of leases, subject, however to an exception where a plan for conversion has been presented, effective upon the purchase by a certain number of tenants. The law, thus, does not arbitrarily limit a more extensive right, but, rather, grants to tenants a limited right which they previously did not have. Appellants, therefore, have no ground for complaint, and the statute is by no means unconstitutional." (Emphasis added).

See also Argo v. Hills, 425 F.Supp. 151, 157-58 (E.D.N.Y.1977).

In short, the tenant-plaintiffs had no rights at all to renewal leases except by virtue of the City Rent Control Law, that gave them only limited rights which they previously did not have and there has thus been no deprivation and the law may not be said to be unconstitutional.

It is important to note that the cases cited by the tenant-plaintiffs, viz., Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970);[3] Escalera v. New York City Housing Authority, 425 F.2d 853 (2d Cir. 1970), cert. denied, 400 U.S. 853, 91 S.Ct. 54, 27 L.Ed.2d 91 (1970); Lopez v. Henry Phipps Plaza South, Inc., 498 F.2d 937 (2d Cir. 1974); and Short v. Fulton Redevelopment Co., 390 F.Supp. 517 (S.D.N.Y. 1975), all involved "governmental involvement" in termination

and rent increase situations. No such governmental involvement exists in the case at bar.

Moreover, as indicated above, the procedures prescribed by the City Rent Control Law and the Regulations promulgated thereunder, afford the tenant-plaintiffs herewith ample protection, fulfill due process requirements and may not be said to be constitutionally deficient. See Burr v. New Rochelle Municipal Housing Authority, 479 F.2d 1165, 1170 (2d Cir. 1973) and Argo v. Hills, 425 F.Supp. 151, at 158-59 (E.D.N.Y. 1977).

Plaintiffs also allege that the City Rent Control Law violates the Equal protection Clause of the Fourteenth Amendment but offer nothing in support thereof other than the claim that the Law discriminates (i) against indigent persons

because it denies them an opportunity to obtain a transcript of the conferences and (ii) against all rent controlled tenants whose eviction is sought (a) on the basis of a certificate of eviction as compared to those whose eviction is sought on other grounds (e.g., non-payment of rent, misconduct, etc.) or (b) by other agencies such as the New York City Housing Authority.

For the reasons indicated above, these contentions are also without merit. Moreover, there is a rational basis for providing different procedures in those cases involving failure to pay rent and misconduct where the factual determinations are in most cases more difficult to make without weighing the credibility of the witnesses and the other evidence.

From the foregoing, it should be

clear that plaintiffs have shown neither probable success on the merits nor sufficiently serious questions going to the merits to make them a fair ground for litigation and hence their motions for a same hereby are denied. It is also clear that plaintiffs are not, and defendants are, entitled to summary judgment herein even though defendants have not cross-moved therefor. Lowenschuss v. Kane, 520 F.2d 255, 261 (2d Cir. 1975).

Accordingly, plaintiffs' motions for a preliminary injunction, class action certification and money judgment herein are denied and defendants are granted judgment dismissing plaintiffs' complaints, with costs.

SO ORDERED.

1. Regulation Section 81. For example, in the Keeler case herein, plaintiff's landlords filed such a sworn application in which they stated: that a three family building owned by a husband and wife is involved; subject tenants' apartment is a ground floor walk-in apartment; possession is requested for the landlady's mother, a widow aged 48, presently living in a top third floor walk-up apartment; information as to ownership and equity in the building, the date landlords took title, from whom, relationship, if any, to predecessor, the purchase price, the amount paid in cash, source of funds and the building's assessed value; the reason for the application and advice from the landlady's mother's physician that she not climb stairs.

2 On the oral arguments, Ms. Florence Zimmerman, counsel for the defendants, represented to the Court and maintained that where a hearing was requested and one was necessary to receive a factual dispute one would be granted. Ms. Toby Golick, Senior Attorney of the Legal Services for the Elderly Poor, who seeks to represent the plaintiff class here, points out that eight of the fourteen named plaintiffs herein requested a hearing and one of them (Angela Criscio) asked for a "full due process hearing" but all of them were a corded only a conference. It may well be that the commissioner is

abusing his discretion in one or more cases in not according one or more of these plaintiffs a hearing but the remedy for that abuse is not found here but in the State courts. For procedural due process purposes it is sufficient that a hearing is available on request and accorded when necessary. See Greenwald, et al., v. Whalen, et al., 609 F.2d 665 (2d Cir. 1979); Pfizer, Inc. v. Richardson, 434 F.2d 536, 543 (2d Cir. 1970). An Article 78 proceeding is available in the event of an abuse of the Commissioner's discretion. See, infra, p. 574.

3. Plaintiffs argue that the standards applicable to welfare benefits which were announced in Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970), apply equally to the case at bar. We disagree. Unlike Goldberg, the instant case does not involve an individual's right to receive continued benefits flowing from the State. Rather, the "benefactor" here is an individual property owner--the extent of whose beneficence is clearly defined by the statute. Thus, a recognition of the distinction between the parties in the two cases demonstrates that Goldberg is not controlling. Moreover, the proceedings complained of are not inconsistent with the Goldberg standard. The extent of the proceedings necessary to protect a citizen's rights must be

determined in light of the nature of the interests involved. Goldberg v. Kelly, 397 U.S. 254, 265, 90 S.Ct. 1011, 1019, 25 L.Ed.2d 287 (1970). The conflicting interests in Goldberg were characterized by the Court as the individual's very means to live versus the government's interest in conserving fiscal and administrative costs. Although the interests of the rent controlled tenant which are ultimately affected are arguably of equal magnitude to those of the plaintiffs in Goldberg, the interest here asserted by the landlord, to wit, the right for him or members of his family upon a showing of a good faith intention, or immediate compelling necessity to occupy property which he owns, is of greater magnitude than those presented by the government in Goldberg. The existing administrative procedures which provide the landlord with an opportunity to show the existence of circumstances which meet the opportunity to contest the existence of those circumstances are sufficient to protect the tenant's interest in ensuring that he is not dispossessed without the requirements of the statute having been met.

APPENDIX C Order Denying Rehearing.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals in and for the Second Circuit, held at the United States Court House, in the City of New York, on the ninth day April, of one thousand nine hundred and eighty-one.

----------x

JACK KEELER and GRACE KEELEER, EMILY RAMOS, ROSE MANN, JOHN NICHOLS, ETHEL McGINNITY, WILMA and JOHN HILBER, individually and on behalf of all others similarly situated,

Plaintiffs,

JACK KEELER and GRACE KEELER,

Plaintiffs-Appellants,

(UNITED STATES COURT OF APPEALS
SECOND CIRCUIT - Filed APR - 9 1981
A. DANIEL FUSARO, CLERK.)

No. 80-7359
80-7362

-against-

DANIEL W. JOY, individually and as Commissioner of the Office of Rent and Housing Maintenance of the City of New York Department of Housing Preservation and Development,

Defendant-Appellee.

----------x

FAY GENUARD, MARGARET J. LENNON and PATRICIA BURKAWYN, individually and on behalf of all others similarly situated,

Plaintiffs,

and

RALPH GULVINO, MARGARET SZAL, ELIZABETH KRAVITZ, LEE FAGIN, ILONA LOVAS, CATERINA STOLFI, JOHANNA ROTKEWICZ and ANGELO CRISCIO, individually and on behalf of all others similarly situated,

Plaintiffs-Intervenors,

RALPH GULVINO, MARGARET SZAL, ELIZABETH KRAVITZ, LEE FAGIN, CATERINA STOLFI and ANGELO CRISCIO,

Plaintiffs-Intervenors-Appellants,

DANIEL W. JOY, individually and as Commissioner of the Office of Rent and Housing Maintenance of the City of New York Department of Housing Preservation and Development,

Defendant-Appellee.

----------x

A joint petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiffs-appellants Jack Keeler and Grace Keeler and counsel for the plaintiffs-intervenors-appellants, Ralph Gulvino, Elizabeth Kravitz, Lee Fagin, Caterina Stolfi and Angelo Criscio,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED, Judge Amalya L. Kearse dissenting.

It is further noted that the suggestion for rehearing in banc has

been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/_____
A. Daniel Fusaro,
Clerk

by /s/ Rolanne Henry
Deputy Clerk

APPENDIX D: Relevant Constitutional and Statutory Provisions

The United States Constitution Amendment XIV, § 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The New York City Rent and Rehabilitation Law, Title Y, §Y51-6.0(b) of the Administrative Code of the City of New York (McKinney's Consolidated Laws of New York, Vol. 62, "Unconsolidated Laws")

> Subject to the provisions of paragraph (3) of subdivision c of section Y15-13.0 of this title, [relating to termination of State regulation and control], no tenant shall be removed or evicted on grounds other than those stated in subdivision a of this section unless on application of the landlord the city rent agency shall issue an order granting a certificate of eviction in accordance with its rules and regulations

designed to effectuate the purposes of this title, permitting the landlord to pursue his remedies at law. The city rent agency shall issue such an order whenever it finds that:

> (1) The landlord seeks in good faith to recover possession of a housing accommodation because of immediate and compelling necessity for his own personal use and occupancy or for the use and occupancy of his immediate family; provided, however, that where the housing accommodation is located in a building containing twelve or less housing accommodations and the landlord does not reside in the building and the landlord seeks in good faith to recover possession for his own personal use and occupancy, an immediate and compelling necessity need not be established; ***

The New York City Rent and Rehabilitation Law, Title Y, § Y51-8.0(c) of the Administrative Code of the City of New York (McKinney's Consolidated Laws of New York, Vol. 62, "Unconsolidated Laws")

Any proceedings under this section may be limited by the city rent agency to the filing of affidavits, or other written evidence, and the filing of briefs,***

Rent and Eviction Regulations of the Housing and Development Administration, Office of Rent Control (McKinney's Consolidated Laws of New York, Vol. 65, "Unconsolidated Laws")

Section 81. Proceedings instituted by landlord or tenant in the Local Rent Office

A proceeding is instituted in a Local Rent Office by a landlord*** with the filing of an application*** for a certificate of eviction,*** Such application shall be verified by the applicant and filed with the Local Rent Administrator for the area within which the housing accommodation is located upon the appropriate form issued by the Administrator in accordance with the instructions contained in such forms.

Section 83. Notice to the parties affected

a. Where the application is made by a landlord or tenant, the District Rent Director shall forward, as promptly as possible, a copy of such application by mail to the person or persons affected thereby.***

Section 85. Action by District Rent Director

At any stage of a proceeding the District Rent Director may:

a. Reject the application if it is insufficient or defective.

b. Make such investigation of the facts, hold such conferences, and require the filing of such reports, evidence, affidavits, or other material relevant to the proceeding, as he may deem necessary or appropriate.

c. Forward to or make available for inspection by either party any relevant evidence and afford an opportunity to file rebuttal thereto.

d. For good cause shown, accept for filing any papers, even though not filed within the time required by these Regulations.

e. Require any person to appear or produce documents, or both, pursuant to a subpoena issued by the Administrator.

f. Consolidate two or more applications or proceedings which have at least one ground in common.

g. Forward to either party a notice of action proposed to be taken by the District Rent Director.

h. Grant or order a hearing

***

Section 94. Form of protest against an order

A person aggrieved by an order issued by the Office of Rent Control may file a protest against such order only on a form prescribed by the Administrator.

Section 97. Action by Commissioner

Within a reasonable time after the filing of the protest and the answers, if any, the Commissioner may:

a. Reject the protest if it is insufficient or defective.

b. Make such investigation of the facts, hold such conferences, and require the filing of such reports, evidence, affidavits, or other material relevant to the proceeding, as he may deem necessary or appropriate.

c. Forward to or make available for inspection by either party any relevant evidence and afford an opportunity to file rebuttal thereto.

d. For good cause shown accept for filing any papers, even though not filed within the time required by these Regulations.

e. Require any person to appear or produce documents or both pursuant to a subpoena issued by the Commissioner.

f. Grant or order a hearing.

Office - Supreme Court, U.S.
FILED
SEP 14 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-48

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JACK KEELER and GRACE KEELER, et al.,

Petitioners,

against

DANIEL W. JOY, individually and as Commissioner of the office of Rent and Housing Maintenance of the City of New York Department of Housing, Preservation and Development,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

HARRY MICHELSON
Attorney for Respondent
17 John Street
New York, N.Y. 10038
Tel. No. (212) 566-5112

Counter-Statement of Questions Presented

The basic procedure to determine entitlement of a landlord to evict under rent control is an informal administrative proceeding to determine whether the landlord satisfies the essentially simple rent control requirements. The administrative procedure includes notice to the tenant, opportunity to rebut the landlord's evidence, to be represented by counsel, to be heard at an informal conference or hearing, the right to an administrative appeal, and to judicial review in the courts.

Following are the issues presented below and in this petition:

1. Does the overall administrative procedure employed afford the tenants due process, considering the nature of the issues in the administrative proceeding?

The Courts below found that due process was provided.

2. Did the District Court below have sufficient information in the record before the court from the administrative records of the 19 plaintiffs to find that there were no substantial, relevant, or material issues of fact outstanding, that the procedures employed satisfied due process requirements, and that the defendant was entitled to summary judgment based on his request therefor in opposition to plaintiffs' motions for summary judgment.

The District Court granted declaratory judgment to defendant Rent Commissioner based on material in the record presented in opposition to the plaintiffs' motions for summary judgment, and the Court of Appeals affirmed.

Counter-Statement as to Parties to Proceeding

The persons listed in the footnote on petitioners' page ii were among the 19 plaintiffs in the District Court actions. However only 7 of the 19 appealed to the Court of Appeals, i.e. Jack and Grace Keeler, Ralph Gulvino, Elizabeth Kravitz, Lee Fagin, Caterina Stolfi, and Angelo Criscio. Class action status was denied at the District Court.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Counter-Statement of the Case

A. The Nature of the Case

This is a test case constitutional challenge by tenants against the procedures and methods of the New York City rent agency for handling eviction cases, in use by the State and City rent control agencies since at least 1950, patterned on federal OPA and OHE procedures in effect from 1943.

The New York City Rent Control Law specifies that the New York City rent agency "shall" issue an administrative order granting a Certificate of Eviction (authorizing the landlord to commence a dispossess proceeding in the courts) where an owner with sufficient equity in his property seeks possession of a rent controlled tenant's apartment for his own use and occupancy or for use and occupancy by a member of the landlord's "immediate family", upon a showing of "good faith" and, in certain cases, upon an additional showing of "immediate and compelling necessity".

The law in New York State is well settled that "good faith" means an owner's honest intention and desire to gain possession for his own occupancy or for occupancy by members of his immediate family. Where the apartment is located in a building containing 12 or less apartments, and the landlord does not already live in the building and seeks the apartment for his own use, then he does not even have to establish an immediate and compelling necessity, and he need only establish that he will in good faith occupy the apartment. The New York City Rent & Eviction Regulations implement the New York City Rent Control Law and define who is included in "immediate family" and also

define the landlord's minimum financial ownership interest for such applications as twenty percent of the purchase price.

Every proceeding is adversary with notice to the affected tenants of everything material that is considered. An aggrieved party has the right to an administrative appeal (protest proceeding), plus judicial review by Article 78 proceeding in the New York Supreme Court, followed by appeals to the Appellate Division, the Court of Appeals and, if a substantial constitutional question is involved, to the United States Supreme Court.

The challenged procedures were specifically designed to provide informal but careful and thorough inquiry and processing of the contentions of "little landlords" and "little tenants" without their need—unless they preferred otherwise—to hire counsel.

Other grounds for obtaining a certificate of eviction are also provided by the NYC Rent Law, but they are not involved in this litigation. The only proceedings that are challenged by these actions are the simple applications by landlords for their own occupancy, or occupancy by a member of the landlord's immediate family.

The tenants maintain they have a constitutionally protected right to continue to occupy their rent controlled apartment, and that they cannot be deprived of their possession without a trial-type hearing in the rent agency. We contend that the tenants are entitled to no more right to continue possession than the rent control legislation provides. The rent control law, which creates their statutory tenancy, states in several ways that landlords and tenants are entitled to an opportunity to be heard, although not a trial-type hearing. The challenged procedures, which comply with the rent control law, are the full measure of tenants' rights, and the informal proceedings are constitutionally adequate because they do in fact provide all the essential elements of due process.

B. Course of the Proceedings Below

The Keeler case was commenced with 8 plaintiffs on January 8, 1979 in the Eastern District of New York. The Genuard case was commenced with 3 plaintiffs on May 21, 1979 in the Southern District of New York but was transferred to the Eastern District for consolidated consideration with Keeler by Judge Platt. The Genuard plaintiffs were also granted leave to serve four additional (not substitute) complaints, thereby adding 8 more plaintiffs, for a total of 19 plaintiffs in the two actions. Each of the six Keeler and Genuard complaints, which describe in detail each administrative proceeding of its plaintiffs, allege that these plaintiffs' proceedings are typical of those used by the defendant in determining landlord applications for a certificate of eviction.

The defendant's Answers with affirmative defenses explained in detail each plaintiff's then pending administrative proceeding.

The plaintiffs then made two motions for summary judgment and their moving affidavits and detailed supporting statements again placed heavy reliance on claims that the 19 plaintiffs' pending administrative proceedings deprived them of due process.

Defendant's answering affidavits requested that summary judgment be granted in defendant's favor (A-303, A-355). The defendant's summary judgment opposing affidavits and responses to the plaintiffs' Rule 9(g) Statements set forth detailed summaries and explanations of those pending administrative proceedings, to date. In addition, the complete unabridged record of each of those administrative proceedings, originally filed on motions for a preliminary injunction, were updated and supplemented to the date of the summary judgment motions and thereafter. This complete unabridged record of the 19 plaintiffs' administrative proceedings is printed, pur-

suant to order of the Court of Appeals, as Appellee's Supplemental Appendix, pages AA-1 through AA-773.

C. Disposition in the Courts Below

In an 18 page opinion, 489 F. Supp. 568, the District Court (Hon. Thomas C. Platt) ruled that: (1) adequate notice is given to tenants; (2) oral conferences are concededly always held and they are adequate to satisfy due process; (3) a taped or stenographic record and a transcript thereof are not needed; (4) the Keeler plaintiffs' administrative proceeding was properly resolved in the District Rent Office, and they were represented by counsel in the protest proceedings; (5) the proceedings collectively consist of 3 separate notices, 2 opportunities to be heard, de novo consideration on the merits on administrative appeal, adequate record of the proceeding, decision with reasons and Article 78 judicial review in the N. Y. Supreme Court; (6) plaintiffs' statutory expectation as a statutory tenant is no greater than the limited right conferred by the N.Y. City Rent Control Law; (7) the procedures afford ample protection, fulfill due process requirements, and are not constitutionally deficient; (8) significantly, at Footnote 3, the District Court noted the statutory "benefactor" under the NYC Rent Control Law is the property owner, whose beneficence is clearly defined by the statute; the existing administrative procedures which provide the landlord with an opportunity to show the existence of circumstances which meet the statutory standard, and the tenant with the opportunity to contest the existence of those circumstances, are sufficient to protect the tenant's interest in ensuring that the tenant is not dispossessed without the statute requirements having been met; (9) there is a rational basis for providing for administrative hearings in certificate of eviction proceedings and the requirement that non-payment and misconduct cases be heard in the courts. Summary judgment was granted in defendant's favor.

On appeal by 7 of the 19 plaintiffs to the Court of Appeals, that Court affirmed with one dissent. 641 Fed. 2d 1044.

Facts

Petitioners' Administrative Proceedings in the District Rent Office

In each tenant-plaintiff's underlying administrative proceeding, challenged below, a landlord had filed an application in the Brooklyn or Queens District Rent Office for an order granting a certificate of eviction against the plaintiff-tenant. Each application sought possession of the plaintiff's apartment for the landlord's own personal use and occupancy, or for occupancy by a member of the landlord's "immediate family."

Each application was entitled "LANDLORD'S APPLICATION FOR CERTIFICATE OF EVICTION (Occupancy by Landlord or Immediate Family—Section 55 of the Regulations)" (AA-25; AA-51; AA-108; AA-110; AA-137; AA-140; AA-189; AA-241; AA-305; AA-338; AA-361; AA-429; AA-478; AA-521; AA-579; AA-676; AA-738). (These "AA" references are to Appellee's Appendix to the Court of Appeals).

The application form requires the landlord to state such details as how much the landlord paid for the property; when and from whom it was purchased, and relationship if any to the seller; cash paid and source of such funds; the then assessed value; name, address and details including relationship to the landlord of the individual who is to occupy the tenant's apartment.

A copy of each application was sent to the tenant affected, together with a "Notice of Commencement of Eviction Proceedings Before the District Rent Director" which read:

"Attached hereto is a copy of an application for a

certificate filed by your landlord. The facts set forth in the application *may* entitle him to such certificate of eviction *under the provisions of the rent regulations.* You are hereby afforded an opportunity to oppose this application by filing an answer • • •

If you fail to file an answer opposing the application within the time limit specified above, the District Rent Director *may* grant a certificate of eviction.

To the Tenant: This is not an Eviction Notice. You Are Not Required to Move Until Ordered by A Court."

(Italics Added)

(AA-28; AA-53; AA-112; AA-143; AA-193; AA-244; AA-307; AA-340; AA-363; AA-433; AA-480; AA-523; AA-582; AA-740).

Each plaintiff filed an answer in opposition to the application (AA-29; AA-54; AA-114; AA-115; AA-148; AA-150; AA-194; AA-245; AA-308; AA-341; AA-364; AA-434; AA-482; AA-524; AA-583; AA-678; AA-741).

An informal conference or hearing was scheduled in each case, and the Notice of Conference read inter alia:

"All inquiries, communications, allegations, etc., having to do with this proceeding must be submitted in writing, in duplicate. Please do not telephone.

• • •

Both landlord and tenant may be represented by counsel and may bring with them witnesses and written evidence in support of their contentions.

Failure to appear at the time stated may be considered a default and may result in a determination based upon the evidence in the record.

• • •

> 1. Landlord is hereby requested to produce at the hearing, contract, deed, mortgage, closing statement bank books and all other evidence relating to the purchase. • • •"

(AA-30; AA-55; AA-119; AA-152; AA-198; AA-251; AA-310; AA-344; AA-368; AA-437; AA-487; AA-526; AA-590; AA-683; AA-742).

Additional documentation was filed in some of the proceedings such as doctor's statement, certificate of birth registration, title papers, a statement from a child care center, a statement from a medical center, a statement from landlord's son, a deed, etc. (AA-27; AA-32; AA-35; AA-206; AA-255; AA-485; AA-486; AA-527; AA-529; AA-585; AA-591; AA-684; AA-754; AA-759). A co-owner's affidavit was filed in some proceedings (AA-264; AA-269; AA-312; AA-319; AA-369; AA-370). An affidavit from the individual for whom occupancy was sought was filed in some proceedings (AA-33; AA-57; AA-347). In one proceeding, a notice was issued to the landlord to reply to the tenant's opposing answer (AA-249). In one proceeding, the landlord's attorney wrote a letter describing ground floor commercial storage space the tenant claimed the landlord should occupy instead of her apartment (AA-263). A physical inspection by an official rent agency inspector was had in some proceedings (AA-36; AA-265; AA-330; AA-751).

An oral conference or hearing was held in the District Rent Office in each proceeding (AA-279; AA-324). The record of each proceeding contains a Report of Conference, together with the Examiner's summary findings, and decision (AA-31; AA-58; AA-130; AA-154; AA-204; AA-253 and AA-272; AA-316; AA-332; AA-346; AA-372; AA-438; AA-492; AA-532; AA-593; AA-595; AA-686; AA-762). Each proceeding also contains an Examiner's Progress Sheet, containing such entries as the dates, when notices, etc., were issued (AA-38; AA-60; AA-133; AA-162;

AA-213; AA-270; AA-272; AA-321; AA-348; AA-375; AA-441; AA-494; AA-535; AA-597; AA-688; AA-760).

Each proceeding was decided by the Examiner who had seen and heard the parties, Lover Deposition, Appendix—Exhibit D at p. 6 lines 15-17; p. 7 lines 1, 2; p. 13 lines 5-6; p. 18 line 17; p. 19 line 6; A-285; A-329; Warden Deposition, Appendix—Exhibit C at p. 5 lines 1-6; p. 12 lines 8-15; p. 14 lines 18-21. There was no contrary evidence submitted in the motion for summary judgment.

Where the order granted the landlord's application for a certificate of eviction, it specified that the apartment was for occupancy "solely" by the named individuals as represented in the proceeding (AA-39; AA-61; AA-164; AA-217; AA-273; AA-350; AA-376; AA-442; AA-496; AA-537; AA-598; AA-689). In some of the proceedings, the landlord's application was denied (AA-134; AA-135; AA-335); and in another, the proceeding was terminated (AA-163).

Plaintiffs' Protest Proceedings (Administrative Appeal)

Protests (administrative appeals) were filed by 13 tenant plaintiffs (AA-40; AA-63; AA-166; AA-221; AA-275; AA-352; AA-378; AA-444; AA-498; AA-539; AA-600; AA-691; AA-766).

Answers in opposition were filed by 11 of the plaintiffs' landlords (AA-44; AA-69; AA-173; AA-229; AA-280; AA-354; AA-383; AA-460; AA-504; AA-610; AA-698).

In some of the proceedings, a Notice of Opportunity to Submit Evidence was issued (AA-72; AA-100). In other proceedings, additional evidence, such as satisfaction certificate, Veteran's Administration Certificate of Eligibility, mortgage, bond, satisfaction certificate, deed, contract, mortgage note, purchase money mortgage, closing statement, rent receipt, was filed (AA-73; AA-91; AA-158; AA-394; AA-555; AA-613; AA-616; AA-618; AA-621; AA-622.

In some of the protest proceedings, a Notice of Conference was issued (AA-78; AA-178; AA-233; AA-285; AA-392; AA-466; AA-509; AA-548; AA-612). Each such proceeding contains the hearing attorney's report of the hearing (AA-86; AA-289; AA-419; AA-420; AA-468; AA-548; AA-552; AA-623; AA625) and in one of the plaintiffs' protest proceedings, still another hearing was had in the protest proceeding (AA-101).

In one of the proceedings, the Notice of Hearing informed the parties they may provide an interpreter (AA-612).

Each order determining a protest appeal proceeding was decided by the hearing attorney (Rabin Deposition, Appendix—Exhibit E p. 4 line 24—p. 5, line 3; p. 34, line 11-13, 23-24; p. 35, line 25—p. 36 line 2; p. 36, line 12-13; p. 37, line 6; p. 44, line 10-12; Joy Deposition Appendix —Exhibit B p. 8, line 20-25; p. 52, line 5-10; p. 104, line 24—p. 105, line 1-5; p. 110, line 6-9. There was no contrary evidence submitted in the summary judgment application or otherwise.

An Order & Opinion Granting Tenant's Protest was issued in three of the plaintiffs' proceedings (AA-102; AA-185; AA-573); an Order & Opinion Denying Tenant's Protest was issued in six of the plaintiffs' proceedings (AA-48; AA-293; AA-422; AA-473; AA-625; AA-701); and an Order & Opinion Dismissing Tenant's Protest was issued in three of the plaintiffs' proceedings (AA-238; AA-356; AA-516).

In two proceedings, the tenant plaintiff commenced an Article 78 judicial review proceeding in the New York Supreme Court. In the first, *Matter of Bukawyn* v. *Joy*, New York Law Journal, Oct. 11, 1979, p. 6, col. 1, the New York Supreme Court, New York County, denied the petition and dismissed the tenant's Article 78 proceeding, fully upholding the Rent Commissioner's order (AA-297; AA-303). No notice of appeal to the New York Appellate Division was filed, and that order became final

under New York law (A-334-342). In another, *Matter of Stolfi* v. *Joy*, unreported, the tenant's Article 78 proceeding in the New York Supreme Court, Kings County, (AA-629 to AA-652), resulted in a judgment affirming the certificate of eviction, following which the tenant filed a notice of appeal to the Appellate Division but never perfected the appeal.

The Controlling Law and Regulations

The NYC Rent Control Law

The NYC Rent Control Law provides (NYC Admin. Code, see Y51-6.0 subd. b(1) [See in McKinney's Unconsol. Laws, third unnumbered vol. containing sec. 8581 to 8700, p. 421, 423]:

"Sec. Y51-6.0. Evictions

b. * * * no tenant shall be removed or evicted on grounds other than those stated in subd. a of this section unless on application of the landlord the city rent agency shall issue an order granting a certificate of eviction * * * permitting the landlord to pursue his remedies at law. The city rent agency *shall* issue such an order whenever it finds that:

(1) The landlord seeks in good faith to recover possession of housing accommodation because of immediate and compelling necessity for his own personal use and occupancy or for the use and occupancy of his immediate family * * *

(Italics ours)

The NYC Rent Control Law further specifies that an immediate and compelling necessity need not be established under the following circumstances (NYC Admin. Code, sec. Y51-6.0, subd. b.(1) [McKinney's *supra*, p. 423]:

"* * * provided, however, that where the housing accommodation is located in a building containing twelve or less housing accommodations and the landlord does not reside in the building and the landlord seeks in

good faith to recover possession for his own personal use and occupancy, an immediate and compelling necessity need not be established: * * *"

The NYC Rent Control Law does not require trial-type hearings in proceedings as are involved here (Admin. Code, Sec. Y51-8.0, subd. c "Procedure" [McKinney's *supra*, p. 437]:

"Any proceedings under this section may be limited * * * to the filing of affidavits, or other written evidence, and the filing of briefs * * *".

The Regulations

The statutory provisions are implemented by Sec. 55, subd. 2 of the N.Y.C. Rent & Eviction Regulations, which provide (McKinney's, *supra*, p. 541 et seq.):

"Sec. 55. Occupancy by landlord or immediate family a. A certificate *shall* be issued where the landlord seeks in good faith to recover possession of a housing accommodation because of immediate and compelling necessity for his own personal use and occupancy, or for the use and occupancy of his immediate family * * * As used in this paragraph, the term 'immediate family' includes only a son, daughter, grandson, granddaughter, stepson, stepdaughter, father, mother, father-in-law, mother-in-law, grandfather, grandmother, stepfather or stepmother."

(Italics ours)

As to landlord's financial ownership interest, the said Regulations provide (see McKinney's *supra* at p. 546):

"Sec. 55. Occupancy of landlord or immediate family.

* * *

"d. Where the landlord purchased and thereby acquired title to the premises on or after September 17, 1947, no certificate shall be issued under this section

unless the landlord on or before the date of the filing of the application has made a payment or payments totalling at least 20% of the purchase price or the assessed valuation of the premises, whichever is the greater; provided, however, that where the Administrator finds (1) that equivalent accommodations are available for rent into which the tenant can move without substantial hardship or loss, or (2) that undue hardship would result to the landlord a certificate may be issued although less than 20% has been paid. The requirements of this paragraph d shall not apply where the landlord is a former member of the armed forces of the U.S.A. who obtained a loan for use in purchasing housing accommodations guaranteed by the Administrator of Veterans Affairs."

POINT I

The determinations below were correct because the administrative eviction proceedings provided a fair procedure and constitutional due process.

The requirements of procedural due process are not inflexible, but depend upon the circumstances of particular situations. In *Matthews* v. *Eldridge*, 424 U.S. 319, 47 L.Ed.2d 18, 96 S.Ct. 893 (1976), this Court stated as to due process in administrative proceedings, at 424 U.S. 348, 349:

"• • • The ultimate balance involved a determination as to when, under our constitutional system, judicial-type procedures must be imposed upon administrative action to assure fairness. We reiterate the wise admonishment of Mr. Justice Frankfurter that *differences in the origin and function of administrative agencies 'preclude wholesale transplantation of the rules of procedure, trial, and review which have evolved from the history and experience of courts'. (citing) The judicial model of an evidentiary hearing*

is neither a required, nor even the most effective, method of decision making, in all circumstances. • • • All that is necessary is that the procedures be tailored • • • to insure that they are given a meaningful opportunity to present their case.

• • •

"In assessing what process is due • • •, substantial weight must be given to the good-faith judgments of the individuals of social welfare programs that the procedures they have provided assure fair consideration. • • •"

(Italics ours)

In response to petitioners' claim that tenants are entitled to a hearing prior to eviction from their rent controlled apartments, we contend that the record of this case proves that at least one oral Conference or Hearing is had in *every* proceeding involving an application for a certificate of eviction and more than one is held where needed. Nowhere have the appellants produced a single administrative proceeding where there was no oral Conference or Hearing (A-368; A-369; A-370); (AA-1 through AA-773; Lover Deposition, p. 10, lines 9-17).

The words "conference", and "hearing" (used by defendant interchangeably throughout this litigation), are adversary, due process hearings (A-368-370).

Petitioners' reliance on *Califano* v. *Yamasaki*, 442 U.S. 682 (1979), is misplaced. The six requirements of an oral hearing, referred to in the opinion of the Court (442 U.S. 692) are allowed in the procedures here under attack, including the right to cross-examine. A transcript of the hearing was not required by the Circuit Court of Appeals, 564 F.2d at 1235, or by this Court.

Plaintiffs cite *Goldberg* v. *Kelly*, 397 U.S. 254, 25 L.Ed. 2d 287, 90 S.Ct. 1011 (1970). However, in *Davenport* v.

Altman, 71 Civ. 4263 (S.D.N.Y., Gurfein, D.J.); *aff'd* 492 F.2d 1237; *cert. den.*, 417 U.S. 969, 41 L.Ed.2d 1140, 94 S.Ct. 3173 (1974), a landlord's claim of lack of due process was considered by the District Court in the light of *Goldberg* v. *Kelly*, and was rejected with this language dismissing the complaint:

> "The plaintiff now contends in this case that he was not granted a 'due process' hearing before the determination by the City Rent Administration. But Magistrate Schreiber found and I confirmed that '[D]uring these proceedings, plaintiff was represented by counsel and afforded the opportunity to answer the charge and present evidence in writing (Finding No. 3). That is, in any event, sufficient for due process in rent control cases. Bowles v. Willingham, 321 U.S. 503, 519-520 (1943).'"

Petitioners fail completely to show a constitutionally protected right or "entitlement" to a trial-type hearing. Their asserted "entitlement secured by statute", "statutory entitlement", "right or benefit conferred by legislation" is no greater than the legislation which created it, and the NYC Rent Control Law is therefore the measure of the right conferred and challenged in this action.

In *Wasservogel* v. *Meyerowitz*, 300 N.Y. 125 (1949), the N. Y. Court of Appeals put into perspective a "statutory tenancy." (Desmond, J.):

> "The tenants then stayed in possession, not under the original lease but as statutory tenants only. As such, each tenant * * * was in the landlord's property 'not by virtue of an agreement, express or implied * * * but by virtue of the compulsion which the law exerts on the landlord to allow him to remain'. Stern v. Equitable Tr. Co., 238 N.Y. 267.
>
> * * *

> A statutory tenant holds over not because he has any property right or estate in the premises, but because emergency laws forbid his eviction * * * Bowles v. Willingham, 321 U.S. 503, 64 S.Ct. 641, 88 L.Ed. 892."

With the rent control law's statutory benefits, the tenant must also bear the statute's burdens.

On the other hand, a landlord's right to possession is related to constitutionally protected rights to property. In *Lindsey* v. *Normet*, 405 U.S. 56, 74, 31 L.E.2d 36, 50, this Court stated:

> "Absent constitutional mandate, * * * the definition of landlord-tenant relationships are legislative, not judicial, functions. Nor should be forget that the Constitution expressly protects against confiscation of private property or the income therefrom."

Continuously since 1950, when the then State Legislature and in 1962, when the City Council enacted the rent law, they expressly specified that the rent control agency must issue a certificate of eviction so that a landlord or a member of his immediate family (and in specified instances when there is an immediate and compelling necessity therefor) shall be able to occupy his own property. Unlike a government agency dispensing a benefit such as welfare or disability insurance, a rent control agency proceeding does not involve solely the tenant versus the government. The affected landlord's rights are always involved. For example, in the administrative proceeding affecting plaintiffs Keeler, the administrative record clearly shows the affected landlord (husband and wife) is the owner of a three-family house, occupying one apartment therein and requesting possession of the Keeler ground floor apartment for the wife's mother because the latter, a widow living alone o nthe third (top) floor elsewhere, has been advised by her doctor not to climb stairs as part of her treatment because she had been operated on for a painful tumor of the lower back and she suffers from low back pain, diabetes

mellitus, severe rhematoid arthritis, lumbo sacro spline and knee joint (AA-25; AA-27; AA-31; AA-32; A-123; A-125; A-130).

In other constitutional attacks on the New York City rent control law, the federal courts have repeatedly upheld the law and its administration, *Eisen* v. *Eastman*, 421 F.2d 560 (2d Cir. 1969); *cert. den.* 400 U.S. 841, 91 S.Ct. 82, 27 L.Ed.2d 75 (1970); *Israel* v. *City Rent & Rehabilitation Admin.*, 285 F.Supp. 908 (S.D.N.Y. 1968); *Davenport* v. *Berman*, 420 F.2d 294 (2d Cir.); *cert. den.* 401 U.S. 956, 26 L.Ed.2d 240, 91 S.Ct. 976 (1971); *Mkwanazi* v. *Ken Ray Associates, Inc.*, 410 F.2d 1143, 1144.

Twice recently this Court has dismissed appeals in rent control cases for want of a substantial federal question. *Kaplan* v. *Prince*, 444 US 938 (1979); *Benson Realty* v. *Koch*, —— U.S. ——, 49 L.W. 3530, 101 S.Ct. 933, 67 L.Ed. 2d 106 (1981).

In *Eisen* v. *Eastman*, 421 F.2d 560, 567, 568, 569 (2d Cir.); *cert. den.*, 400 U.S. 841, 91 S.Ct. 82, 27 L.Ed.2d 75 (1970), the Court of Appeals: (a) affirmed dismissal of a civil rights complaint; and (b) commented on the plaintiff's failure to avail himself of available state remedies:

> "• • • *the consequences of compelling federal courts to pass upon all complaints of unconstitutional acts by state and local officials at the lowest level, without any requirement of appeal to higher ones, would be so destructive of proper concepts of federalism and so needlessly burdensome to the federal courts that it is appropriate to determine whether the decisions have not been given a greater sweep than the Court intended.*
>
> "• • • We shall need much clearer direction than the court has yet given or, we believe, will give, before we hold that plaintiff in such cases may turn their backs on state administrative remedies and rush into a federal forum, whether their actions fall under the Civil Rights Act or come under general federal jurisdiction."
>
> (Italics ours)

POINT II

Summary Judgment was proper because there were no material issues of fact to be decided before the District Court.

Petitioners, not the defendant-respondent, selected the particular 19 plaintiffs in 16 administrative proceedings to be used to demonstrate their declaratory judgment complaints alleging constitutionally inadequate and deficient procedures for hearing and determining landlord applications for certificates of eviction.

In addition to the full description of the administrative procedures and proceedings described in the (a) pleadings; (b) the affidavits of both sides on the five motions for a preliminary injunction; (c) the affidavits of both sides on the two motions for summary judgment; (d) the two comprehensive Rule 9(g) Statements by both sides, the District Court also had before it the complete unabridged record of each of the 19 plaintiffs in 16 administrative proceedings. Under the circumstances, the court had a full statement of the claims as articulated by each side plus the complete original papers, so that it was not left in doubt as to any material or relevant issues of fact. The few areas of remaining dispute all clearly involve facts not central to the question of whether the overall rent control procedure substantially provides due process. Quibbles about isolated details do not detract from the broad picture of institutionalized due process derived from reading the complete administrative records of all 19 plaintiffs eviction cases in the record of this case.

The District Court clearly had sufficient data on this record to find that there were no substantial issues of fact outstanding, and that the procedures employed satisfied due process requirements.

The petitioners admitted there were no triable issues of fact when they made their two motions for summary judg-

ment, and they are now taking an inconsistent position when they complain about not having a trial. We agreed there were no triable issues and requested that summary judgment, on plaintiffs' motion, be granted to defendant (A-303, A-355). Petitioners are in error in claiming that the District Court granted summary judgment *sua sponte*. Nevertheless, case law upholds granting of summary judgment even without a request for such relief. The District Court properly granted declaratory judgment to defendant Rent Commissioner, based on the very full record before it. In *Lowenschuss* v. *Kane*, 520 F.2d 255, 261 (2d Cir. 1975), the Court of Appeals held:

> "We have sanctioned a sua sponte award by the court of summary judgment to a non-moving party where it appeared from the papers, affidavits and other proof submitted by the parties that there were no disputed issues of material fact and that judgment for the non-moving party would be appropriate as a matter of law. Local 33, Int'l Hod Carriers Union v. Mason Tenders Dist. Council, 291 F.2d 496, 505 (2d Cir. 1961) • • •"

In *Local 33, Int'l Hod Carriers etc.* v. *Mason Tenders*, 291 F.2d 496 (2d Cir. 1961), the court held (Medina, C. J.):

> "There remains the question whether there is authority to grant summary judgment for defendants in the absence of a cross-motion for summary judgment. It is Professor Moore's view that such a motion would be a mere formality and is unnecessary in a situation such as we have before us, where the proofs before the court show plaintiff has no case. Moore's Federal Practice, vol. 6, pp. 2088-9 • • •"

To the same effect, see:

> 6 Moore's Federal Practice, Sec. 56.12 (2d ed. 1976).

CONCLUSION

For all of the foregoing reasons, the petition for certiorari should in all respects be denied.

Dated: New York, New York
September, 1981

Respectfully submitted,

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No. 81-48

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JACK KEELER and GRACE KEELER, et al.,
Petitioners,

—against—

DANIEL W. JOY, individually and as Commissioner of the office of Rent and Housing Maintenance of the City of New York Department of Housing, Preservation and Development,
Respondent.

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Petitioners respectfully submit that it is plain, on the face of respondent's brief in opposition, that summary judgment for respondent was erroneously granted, and that the error was of constitutional dimension because the factual issues are of constitutional dimension.

The brief in opposition is almost exclusively concerned with the procedures that are supposed to be employed in these eviction cases, rather than with what actually happens. Only in the last two pages (pp. 17-18) of his brief does respondent even purport to deal with the crucial question: was summary judgment properly granted? Respondent's brief's terminal paragraphs on the basic issue concede (p. 17) that the record before the district court contained "areas of remaining dispute" involving "facts."

Respondent describes these areas as "few" and as "quibbles," but these adjectives are no answer to Judge Kearse's meticulous specification of the nature of these "areas" (Pet. pp. A-34-40).[1]

Respondent asserts that petitioner, by moving as plaintiff for summary

---

[1] Judge Tenney also recognized that there were "unresolved" factual issues, but he declared that they "fail to rise to constitutional proportions" (Pet. p. A-25). But even if, as he states (ibid), a "full blown evidentiary hearing is not constitutionally required," such issues as whether oral conferences are in fact always held, whether the notices sent in fact lull the recipients instead of alerting them, whether evidence is received on behalf of a party though never shown to the adverse party, and whether cross examination of adverse witnesses is denied, are undeniably of constitutional dimension.

judgment, conceded that there are no issues of fact. That is obviously absurd, for petitioners' effort below to establish that there was no evidence to contradict their claim certainly involved no concession that there was no evidence in their support. And, as Judge Kearse stated in her dissent (Pet. p. A-32):

> in assessing plaintiffs' motion, the court was required to resolve all ambiguities and draw all legitimate inferences against the plaintiffs. But it could not then use these unfavorable resolutions and inferences to justify entry of judgment against plaintiffs as a matter of law. In order to determine whether the Commissioner is entitled to judgment as a matter of law, any disputes as to material facts must be resolved in favor of the Tenants.

Petitioner emphatically agrees with respondent's observation (p. 15) that

"a landlord's right to possession is related to constitutionally protected rights to property." The fact that in this particular case the plaintiffs are tenants should not erroneously color the issue as one of tenants' rights against landlords; the latter may suffer just as much from sloppy failures to observe the rudiments of due process. Furthermore, the practices challenged here do not even have the virtue of speed. Administrative procedures in the petitioners' cases took from five months to over a year to be completed; the changes petitioners seek (e.g., notice, opportunity to rebut adverse evidence) would not make the existing procedures more time-consuming or expensive, but only more fair to both tenants and landlords.

Petitioners contend that since the challenged eviction procedures always involve factual issues (whether the landlord is proceeding in good faith and, if applicable, whether the landlord has an immediate and compelling necessity for the apartment) which are finally determined at the administrative level, due process requires personal contact between the parties and the decision maker, an opportunity to confront and question adverse witnesses, to inspect documentary submissions and to file rebuttal material, as well as adequate notice. These critical due process rights are now denied to both the landlords and tenants of over 400,000 rent controlled apartments in the City of New York by virtue of a decision with far-reaching ramifications for other administrative agencies.

Petitioners suggest that there is no need for argument in this Court in a case where factual issues of constitutional dimension are plainly present, and their exploration in the district court has been erroneously aborted by summary judgment. Accordingly, we respectfully move this Court to reverse the judgment below and remand the case to the district court so that it may proceed to trial.

Dated: October 5, 1981

Respectfully submitted,

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